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Legislative Document

No. 1011

S.P. 351

In Senate, March 19, 2015

**An Act To Address Drug Testing in the Workplace and the Effect of
Approved Substances on Current Drug Policy**

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 WARD of Dedham and
Senators: BRAKEY of Androscoggin, BURNS of Washington, COLLINS of York,
EDGECOMB of Aroostook, MASON of Androscoggin, ROSEN of Hancock, President
THIBODEAU of Waldo, Representative: BICKFORD of Auburn.

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

2 **PART A**

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

5 **6. Probable cause.** "Probable cause" means a reasonable ground for belief in the
6 existence of facts that induce a person to believe that an employee may be under the
7 influence of a substance of abuse, ~~provided~~ except that the existence of probable cause
8 may not be based exclusively on any of the following:

9 A. Information received from an anonymous informant; or

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

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

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

18 No employer may require, request or suggest that any employee or applicant submit
19 to a substance abuse test except in compliance with this section. All actions taken under
20 a substance abuse testing program ~~shall~~ must comply with this subchapter, rules adopted
21 under this subchapter and the ~~employer's written policy approved under section 686~~
22 model policy adopted pursuant to subsection 2.

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24 is repealed.

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

27 **2. Statewide drug-free workplace model policy.** The Commissioner of Labor shall
28 establish a single, comprehensive statewide drug-free workplace model policy to be
29 managed by the Department of Labor. The model policy must be in compliance with all
30 pertinent rules and regulations for employers conducting substance abuse testing. The
31 model policy must be posted on the bureau's publicly accessible website. Before
32 establishing any substance abuse testing program, an employer must ~~develop or, as~~
33 required in section 684, subsection 3, paragraph C, must appoint an employee committee
34 to develop a written policy in compliance with this subchapter providing ~~adopt the model~~
35 policy, except that an employer may retain its workplace policy approved under former
36 section 686 until June 30, 2016 if the workplace policy was approved prior to the
37 establishment of the model policy and is as stringent as or more stringent than the model
38 policy. Effective July 1, 2016, all employers shall adopt the model policy. The

1 department shall treat all employers that adopt the model policy as having the same
2 substance abuse testing policy. The model policy must provide for, at a minimum:

3 A. The procedure and consequences of an employee's voluntary admission of a
4 substance abuse problem and any available assistance, ~~including the availability and~~
5 ~~procedure of the employer's employee assistance program;~~

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

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

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

14 C. The collection of samples.

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

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

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

23 (b) If it is the standard practice of an off-site medical facility to require the
24 removal of clothing when collecting a urine sample for any purpose, the
25 physician or nurse supervising the collection of the sample in that facility
26 may require the employee or applicant to remove ~~their~~ the employee's or the
27 applicant's clothing.

28 (3) No employee or applicant may be required to provide a urine sample while
29 being observed, directly or indirectly, by another individual.

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

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

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

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

12 **3. Informing employees and applicants.** The employer shall ~~provide each~~
13 ~~employee with a copy of the written policy approved by the Department of Labor under~~
14 ~~section 686~~ publish on a portion of its website that is accessible to employees the
15 employer's workplace substance abuse testing policy adopted pursuant to this section at
16 at least 30 days before any portion of the ~~written~~ policy applicable to employees takes
17 effect. ~~The employer shall provide each employee with a copy of any change in a written~~
18 ~~policy approved by the Department of Labor under section 686 at least 60 days before~~
19 ~~any portion of the change applicable to employees takes effect. The Department of Labor~~
20 ~~may waive the 60 day notice for the implementation of an amendment covering~~
21 ~~employees if the amendment was necessary to comply with the law or if, in the judgment~~
22 ~~of the department, the amendment promotes the purpose of the law and does not lessen~~
23 ~~the protection of an individual employee.~~ If an employer intends to test an applicant, the
24 employer shall ~~provide~~ inform the applicant ~~with a copy of the written policy under~~
25 ~~subsection 2 before administering a substance abuse test to the applicant. The 30 day and~~
26 ~~60 day notice periods provided for employees under this subsection do not apply to~~
27 ~~applicants that the employer's workplace substance abuse testing policy adopted pursuant~~
28 ~~to this section can be located on the bureau's website.~~

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

32 B. In the case of an employee, have a blood sample taken from the employee by a
33 licensed physician, registered physician's assistant, registered nurse or a person
34 certified by the Department of Health and Human Services to draw blood samples.
35 The employer shall have this sample tested for the presence of alcohol or marijuana
36 metabolites, if those substances are to be tested for under the employer's ~~written~~
37 workplace substance abuse testing policy. If the employee requests that a blood
38 sample be taken as provided in this paragraph, the employer may not test any other
39 sample from the employee for the presence of these substances.

40 (1) The Department of Health and Human Services may identify, by rules
41 adopted under section 687, other substances of abuse for which an employee may
42 request a blood sample be tested instead of a urine sample if the department
43 determines that a sufficient correlation exists between the presence of the

1 substance in an individual's blood and its effect upon the individual's
2 performance.

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

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

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

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

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

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

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

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

1 establish the testing program. The employer may not change the written policy
2 without approval of the employee committee.

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

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

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

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

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

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

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

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

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

34 (a) Except to the extent that costs are covered by a group health insurance
35 plan, the costs of the public or private rehabilitation program ~~must be equally~~
36 ~~divided between the employer and employee if the employer has more than~~
37 ~~20 full-time employees~~ are the responsibility of the employee. This
38 requirement does not apply to municipalities or other political subdivisions of
39 the State or to any employer when the employee is tested because of the
40 alcohol and controlled substance testing mandated by the federal Omnibus
41 Transportation Employee Testing Act of 1991, Public Law 102-143, Title V.

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If necessary, the employer shall assist in financing the cost share of the employee through a payroll deduction plan.

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

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

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

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

(a) If the employee who has completed rehabilitation previously worked in an employment position subject to random or arbitrary testing under ~~an~~ the employer's ~~written~~ workplace substance abuse testing policy adopted under section 683, subsection 2, the employer may refuse to allow the employee to return to the previous job if the employer believes that the employee may pose an unreasonable safety hazard because of the nature of the position. The employer shall attempt to find suitable work for the employee immediately after refusing the employee's return to the previous position. No

1 reduction may be made in the employee's previous benefits or rate of pay
2 while awaiting reassignment to work or while working in a position other
3 than the previous job. The employee ~~shall~~ must be reinstated to the previous
4 position or to another position with an equivalent rate of pay and benefits and
5 with no loss of seniority within 6 months after returning to work in any
6 capacity with the employer unless the employee has received a subsequent
7 confirmed positive result within that time from a test administered under this
8 subchapter or unless conditions unrelated to the employee's previous
9 confirmed positive test result make that reinstatement or reassignment
10 impossible. Placement of the employee in suitable work and reinstatement
11 may not conflict with any provision of a collective bargaining agreement
12 between the employer and a labor organization that is the collective
13 bargaining representative of the unit of which the employee is or would be a
14 part.

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

23 **Sec. A-11. 26 MRSA §685, sub-§3, ¶A**, as enacted by PL 1989, c. 536, §§1 and
24 2 and affected by c. 604, §§2 and 3, is amended to read:

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

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

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

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

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

38 **Sec. A-14. Effective date.** This Part takes effect July 1, 2016.

39 **PART B**

40 **Sec. B-1. Marijuana workplace policy.** The Department of Health and Human
41 Services and the Department of Labor shall jointly develop a policy to address the impact

1 of medical marijuana use in the workplace, including what steps the State recommends
2 for an employer to take if an employee tests positive for marijuana use. By December 2,
3 2015, the Department of Labor shall submit its report detailing the marijuana workplace
4 policy along with any recommended legislation to the Joint Standing Committee on
5 Labor, Commerce, Research and Economic Development. The Joint Standing
6 Committee on Labor, Commerce, Research and Economic Development may submit a
7 bill based upon the report to the Second Regular Session of the 127th Legislature.

8

SUMMARY

9 Current law requires employers that want to provide a drug-free workplace by testing
10 applicants or employees for substance abuse to develop and file a policy with the
11 Department of Labor. The Bureau of Labor Standards reviews the policies to ensure
12 compliance with state laws and rules. This bill provides employers with a single,
13 consistent model policy. The model policy, which must be established by the
14 Commissioner of Labor and managed by the department, is intended to encourage greater
15 participation by employers to reduce substance abuse in the workplace. The bill requires
16 an employer to adopt the model policy before establishing a substance abuse testing
17 program. It removes the requirements that employers provide an employee assistance
18 program and pay for half of rehabilitation beyond services provided through health care
19 benefits. Employers may offer an employee assistance program if they choose. The bill
20 amends the definition of "probable cause" to provide that a single work-related accident is
21 probable cause to suspect an employee is under the influence of a substance of abuse.
22 This bill requires the Department of Labor and Department of Health and Human
23 Services to develop a policy to address the impact of medical marijuana use in the
24 workplace for submission to the Joint Standing Committee on Labor, Commerce,
25 Research and Economic Development by December 2, 2015.