

STATE OF MAINE

IN THE YEAR OF OUR LORD
TWO THOUSAND TWENTY-SIX

H.P. 1425 - L.D. 2110

An Act to Update Employer Substance Use Testing Policy Requirements

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

Sec. 1. 26 MRSA §681, sub-§1, ¶C, as amended by PL 2017, c. 407, Pt. A, §105, is further amended to read:

C. Ensure that an employee with substance use disorder receives an opportunity for rehabilitation and treatment of the disease and returns to work as quickly as possible; ~~and~~

Sec. 2. 26 MRSA §681, sub-§1, ¶D, as enacted by PL 1989, c. 832, §1, is amended to read:

D. Eliminate drug use in the workplace; ~~and~~

Sec. 3. 26 MRSA §681, sub-§1, ¶E is enacted to read:

E. Protect employees in the State from injuries and illnesses caused by impairment in the workplace.

Sec. 4. 26 MRSA §681, sub-§2, as amended by PL 2017, c. 407, Pt. A, §105, is further amended to read:

2. Employer discretion. This subchapter does not require or encourage employers to conduct substance use testing of employees or applicants. An employer ~~who~~ that chooses to conduct such testing is limited by this subchapter, but may establish policies that are supplemental to and not inconsistent with this subchapter. An employer that chooses to conduct testing pursuant to this subchapter shall follow the procedures of the employer's substance use testing policy fully once a test has been initiated.

Sec. 5. 26 MRSA §681, sub-§3, as amended by PL 2017, c. 407, Pt. A, §105, is further amended by amending the first blocked paragraph to read:

A With the approval of the Department of Labor, a labor organization with a collective bargaining agreement effective in the State may conduct a program of substance use testing of its members. The program may include testing of new members and periodic testing of all members. It may not include random testing of members. The program may be voluntary. The results may not be used to preclude referral to a job where testing is not

required or to otherwise discipline a member. Sample collection and testing must be done in accordance with this subchapter. ~~Approval of the Department of Labor is not required.~~

Sec. 6. 26 MRSA §681, sub-§8, as amended by PL 2017, c. 407, Pt. A, §105, is further amended to read:

8. ~~Nuclear power plants; federal law~~ Federally mandated substance use testing program. 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.~~

C. This subchapter does not apply to any employer subject to a federally mandated substance use 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, its applicants for employment and its employees, including independent contractors and employees of independent contractors who are working for or at the facilities of an employer who that is subject to such a federally mandated substance use testing program. To qualify for the limitation under this paragraph, the employer must have at least one employee located in the State for whom substance use testing is federally mandated, and the employer, in conducting any substance use testing of applicants or employees for whom substance use testing is not federally mandated, shall follow the same federal regulations applicable to the testing of employees for whom substance use testing is federally mandated.

Sec. 7. 26 MRSA §682, sub-§1-A is enacted to read:

1-A. Criteria-based testing. "Criteria-based testing" or "criteria-based," with respect to substance use testing, means that the frequency of substance use testing and the selection of persons being tested are based on a set event, such as an employment anniversary or promotion. "Criteria-based testing" includes client-required or site-specific testing based on criteria unrelated to substance use, such as when a client requires testing prior to work on a project or specific site.

Sec. 8. 26 MRSA §682, sub-§3-A, as amended by PL 2017, c. 407, Pt. A, §106, is repealed.

Sec. 9. 26 MRSA §682, sub-§3-B is enacted to read:

3-B. Legitimate medical explanation. "Legitimate medical explanation" means an explanation provided by an employee that justifies a confirmed positive result on a test for a tested-for substance. "Legitimate medical explanation" includes:

A. Use of a controlled substance with a valid prescription, prescribed for a legitimate medical purpose in a quantity appropriate for the condition and expected duration with levels consistent with prescribed amounts; or

B. Legal use of cannabis pursuant to the Maine Medical Use of Cannabis Act.

Sec. 10. 26 MRSA §682, sub-§3-C is enacted to read:

3-C. Medical review officer. "Medical review officer" means a person who is a licensed physician and who is responsible for receiving and reviewing laboratory results

generated by an employer's substance use testing program and evaluating medical explanations for certain substance use test results.

Sec. 11. 26 MRSA §682, sub-§5, as amended by PL 2017, c. 407, Pt. A, §106, is further amended to read:

5. Positive Non-negative test result. "Positive Non-negative test result" means a test result that indicates the presence of a substance in the tested sample above the cutoff level of the test but that has not been confirmed by a confirmation test.

A. "Confirmed positive result" means a confirmation test result that indicates the presence of a substance above the cutoff level in the tested sample.

Sec. 12. 26 MRSA §682, sub-§5-A is enacted to read:

5-A. Observable behavior. "Observable behavior" means observable physical, behavioral or psychological signs that can be seen, heard, smelled or otherwise observed that provide a reasonable suspicion that an employee is impaired by substance use, including signs regarding appearance, behavior, speech or odor that are usually associated with substance use.

Sec. 13. 26 MRSA §682, sub-§5-B is enacted to read:

5-B. Random testing. "Random testing" or "random" means a neutral selection method by which all employees have an equal chance of being selected for substance use testing.

Sec. 14. 26 MRSA §682, sub-§6, as amended by PL 2017, c. 407, Pt. A, §106, is further amended to read:

6. ~~Probable-cause~~ Reasonable suspicion. "~~Probable-cause Reasonable suspicion~~" means ~~a reasonable ground for belief in the existence of facts that induce a person to believe specific and articulable facts that, taken together with rational inferences from those facts, reasonably support the belief that an employee may be under the influence of a substance, provided except that the existence of probable-cause reasonable suspicion may not be based exclusively on any of the following:~~

A. Information received from an anonymous informant;

B. Any information tending to indicate that an employee may have possessed or used a substance off duty, except when the employee is observed possessing or ingesting any substance 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; or

C. A single work-related accident without the employee also exhibiting observable behavior indicating impairment at the time of the accident.

Sec. 15. 26 MRSA §682, sub-§7, as amended by PL 2017, c. 407, Pt. A, §106, is further amended to read:

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

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

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

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

C. "Federally recognized substance use test" means any substance use test recognized by the federal Food and Drug Administration as accurate and reliable through the administration's clearance or approval process.

Sec. 16. 26 MRSA §683, sub-§2, as amended by PL 2017, c. 407, Pt. A, §107 and PL 2021, c. 669, §5, is further amended to read:

2. Written policy. Before establishing any substance use testing program, an employer shall develop ~~or, as required in section 684, subsection 3, paragraph C, appoint an employee committee to develop~~ a written policy in compliance with this subchapter providing for, at a minimum:

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

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

(1) Which positions, if any, will be subject to testing, including any positions subject to random or ~~arbitrary~~ criteria-based testing under section 684, subsection

3. For applicant testing and ~~probable-cause~~ reasonable suspicion testing of employees, an employer may designate that all positions are subject to testing; and

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

C. The collection of samples.

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

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

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

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

(3) An employee or applicant may not be required to provide a urine sample while being observed, directly or indirectly, by another individual.

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

(5) If the employer proposes to use the type of screening test described in section 682, subsection 7, paragraph A, subparagraph (1), the employer's policy must include:

(a) Procedures to ensure the confidentiality of test results as required in section 685, subsection 3; and

(b) Procedures for training persons performing the test in the proper manner of collecting samples and reading results, maintaining a proper chain of custody and complying with other applicable provisions of this subchapter;

D. The storage of samples before testing sufficient to inhibit deterioration of the sample;

E. The chain of custody of samples sufficient to protect the sample from tampering and to verify the identity of each sample and test result;

F. The substances to be tested for;

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

(1) Cutoff levels for confirmation tests for cannabis 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 test and confirmation test cutoff levels for other substances, 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 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 use 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;~~

- H. The consequences of a confirmed positive ~~substance use test~~ result;
- I. The consequences for refusal to submit to a substance use test;
- J. Opportunities and procedures for rehabilitation following a confirmed positive result;
- K. A procedure under which an employee or applicant who receives a confirmed positive result may appeal and contest the accuracy of that result. The policy must include a mechanism that provides an opportunity to appeal at no cost to the appellant; and
- L. Any other matters required by rules adopted by the Department of Labor under section 687.

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

Sec. 17. 26 MRSA §683, sub-§5, ¶B, as amended by PL 2019, c. 627, Pt. B, §7; PL 2021, c. 669, §5; and PL 2025, c. 316, §3, is further amended to read:

B. In the case of an employee, have a blood sample taken from the employee by a licensed physician, licensed physician associate, or registered nurse or a other person certified by the Department of Health and Human Services trained and qualified to draw blood samples. The employer shall have this sample tested for the presence of alcohol or cannabis metabolites, if those substances are to be tested for under the employer's written policy. If the employee requests that a blood sample be taken as provided in this paragraph, the employer may not test any other sample from the employee for the presence of these substances. The employer shall ensure that the testing facility and confirmation testing laboratory used by the employer accepts and has the ability to test blood samples.

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

(2) An employer may not require, request or suggest that any employee or applicant provide a blood sample for substance use testing purposes nor may any

employer conduct a substance use test upon a blood sample except as provided in this paragraph.

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

Sec. 18. 26 MRSA §683, sub-§5-A, as amended by PL 2017, c. 407, Pt. A, §107, is further amended to read:

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

A. A noninstrumented point of collection test described in section 682, subsection 7, paragraph A, subparagraph (1) may be performed at the point of collection rather than in a laboratory. Subsections 6 and 7 and subsection 8, paragraphs A to C do not apply to such screening tests. Subsection 5 applies only to a sample that results in a positive non-negative test result.

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

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

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

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

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

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

Sec. 19. 26 MRSA §683, sub-§6, as amended by PL 2017, c. 407, Pt. A, §107, is further amended to read:

6. Qualified testing laboratories required. ~~An~~ Except as provided in subsection 5-A, an employer may not administer or perform any screening tests or substance use test administered tests to any of that employer's employees. ~~An employer may perform screening tests administered to applicants if the employer's testing facilities unless the employer's testing facilities comply with the requirements for testing laboratories under this subsection. Except as provided in subsection 5-A, any substance use test administered under this subchapter must be performed in a qualified testing laboratory that complies with a qualified testing laboratory under this subsection.~~

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

C. The laboratory must demonstrate satisfactory performance in the proficiency testing program of the National Institute on Drug Abuse, the College of American ~~Pathology~~ Pathologists or the ~~American~~ Association for ~~Clinical Chemistry~~ Diagnostics and Laboratory Medicine or a successor organization.

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

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

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

(a) The use of internal quality controls during each substance use test conducted under this subchapter, including the use of blind samples and samples of known concentrations that are used to check the performance and calibration of testing equipment;

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

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

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

Sec. 20. 26 MRSA §683, sub-§7, as amended by PL 2017, c. 407, Pt. A, §107, is further amended to read:

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

Sec. 21. 26 MRSA §683, sub-§7-A is enacted to read:

7-A. Medical review officer. A medical review officer must have knowledge and clinical experience of controlled substance use disorders and be knowledgeable in deviations of substance use testing specimens and causes of invalid testing results. The medical review officer shall act independently in carrying out any testing reviews pursuant to this section.

Sec. 22. 26 MRSA §683, sub-§8, ¶A, as amended by PL 2017, c. 407, Pt. A, §107, is further amended by amending subparagraph (2) to read:

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

(a) Unless the employee or applicant consents, test results may not be reported in numerical or quantitative form but must state only that the test result was ~~positive~~ a confirmed positive result, with or without a legitimate medical explanation, or negative. This division does not apply if the test or the test results ~~become~~ result becomes the subject of any grievance procedure, administrative proceeding or civil action.

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

Sec. 23. 26 MRSA §683, sub-§8, ¶B, as amended by PL 1989, c. 832, §9, is further amended to read:

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

Sec. 24. 26 MRSA §683, sub-§8, ¶B-1 is enacted to read:

B-1. An applicant or employee must be given the opportunity to contest a non-negative test result by discussing with the medical review officer or confirmation testing laboratory representative any legitimate medical explanation for the non-negative test result. If the medical review officer or laboratory representative determines that there is a legitimate medical explanation for the non-negative test result, the result must be reported to the employer as a confirmed positive result with a legitimate medical explanation. If the medical review officer or laboratory representative determines that there is no legitimate medical explanation for the non-negative test result, the result must be reported to the employer as a confirmed positive result.

Sec. 25. 26 MRSA §683, sub-§8, ¶D, as amended by PL 2017, c. 407, Pt. A, §107, is further amended to read:

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

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

E. A confirmed positive result may be reported to an employer only by a medical review officer. The medical review officer shall contact the employee or applicant and, if necessary, the employee's or applicant's physician to review each confirmed positive result 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 or applicant and the medical review officer is not subject to the physician-patient privilege, but the medical review officer shall protect the confidentiality of the substance use testing information as otherwise provided in this subchapter. The medical review officer may not disclose the presence or absence of any physical or mental condition of the employee or applicant or the presence or absence of any substances other than those allowed to be tested for under the Department of Health and Human Services laboratory testing rules.

Sec. 27. 26 MRSA §684, sub-§2, as amended by PL 2017, c. 407, Pt. A, §108, is further amended to read:

2. ~~Probable-cause~~ Reasonable suspicion testing of employees. An employer may require, request or suggest that an employee submit to a substance use test if the employer has ~~probable-cause~~ reasonable suspicion to ~~test the employee~~ believe that, based on observable behaviors, the employee may be impaired.

A. The employee's immediate supervisor, other supervisory personnel, a licensed physician or nurse, or the employer's security personnel must make the determination of ~~probable-cause~~ reasonable suspicion.

B. The supervisor or other person must state, in writing, the facts upon which the determination made under paragraph A is based and provide a copy of the statement to the employee prior to the test's being conducted.

Sec. 28. 26 MRSA §684, sub-§3, as amended by PL 2017, c. 407, Pt. A, §108, is further amended to read:

3. ~~Random or arbitrary~~ criteria-based testing of employees. In addition to testing employees on a ~~probable-cause~~ reasonable suspicion basis under subsection 2, an employer may require, request or suggest that an employee submit to a substance use test on a random or ~~arbitrary~~ criteria-based 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~~ September 30, 1989, that provide for random or ~~arbitrary~~ criteria-based testing of employees. A random or ~~arbitrary~~ criteria-based 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 threat to the health or safety of the public or the employee's coworkers if the employee were under the influence of a substance. 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~~ criteria-based 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 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. 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.~~

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

~~(3) The written policy developed under subparagraph (2) required by section 683, subsection 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.~~

~~(4) 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 shall 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. 29. 26 MRSA §684, sub-§5, as amended by PL 2017, c. 407, Pt. A, §108, is further 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 program under section 685, subsection 2, the employer may require, request or suggest that the employee submit to a one unannounced subsequent substance use 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 use test during the first 90 days after the date of the employee's prior test only as provided in subsections 2 and 3.

Sec. 30. 26 MRSA §685, sub-§2, ¶A, as amended by PL 1995, c. 324, §7, is further amended to read:

A. Subject to any limitation of the Maine Human Rights Act or any other state law, including laws relating to the medical use of cannabis, or federal law, an employer may use a confirmed positive result or refusal to submit to a test as a factor 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.

Sec. 31. 26 MRSA §685, sub-§2, ¶B, as amended by PL 2017, c. 407, Pt. A, §109, is further amended to read:

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 program designed to enable the employee to avoid future use of a substance and to participate in an employee assistance program, if the employer has such a program. The employer may take any action described in paragraph A if the employee receives a subsequent confirmed positive result from a test administered by the employer under this subchapter.

Sec. 32. 26 MRSA §685, sub-§2, ¶C, as amended by PL 2017, c. 407, Pt. A, §109, is further amended by amending subparagraph (1), division (a) to read:

(a) Except to the extent that costs are covered by a group health insurance plan, the costs of the public or private rehabilitation program ~~must be equally divided between the employer and employee if the employer has more than 20 full-time employees~~ are the sole responsibility of the employee. 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, Title V. If necessary, the employer shall assist in financing the cost share of the employee through a payroll deduction plan.

Sec. 33. 26 MRSA §685, sub-§2, ¶C, as amended by PL 2017, c. 407, Pt. A, §109, is further amended by repealing subparagraph (1), division (b).

Sec. 34. 26 MRSA §685, sub-§2, ¶C, as amended by PL 2017, c. 407, Pt. A, §109, is further amended by amending subparagraph (2) to read:

(2) An employer may not 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 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.

Sec. 35. 26 MRSA §685, sub-§2, ¶C, as amended by PL 2017, c. 407, Pt. A, §109, is further amended by amending subparagraph (2-A) to read:

(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~~ 12-week period provided in paragraph B. Upon receipt of this notice, the employer may take any action described in paragraph A.

Sec. 36. 26 MRSA §685, sub-§2, ¶C, as amended by PL 2017, c. 407, Pt. A, §109, is further amended by amending subparagraph (3) to read:

(3) Except as provided in ~~divisions~~ division (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 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~~ 12 weeks 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~~ criteria-based 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. A reduction may not be made in the employee's previous benefits or rate of pay while the employee is awaiting reassignment to work or working in a position other than the previous job. The employee must 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 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 on that date.~~

Sec. 37. 26 MRSA §686, sub-§1, ¶B, as enacted by PL 1989, c. 536, §§1 and 2 and affected by c. 604, §§2 and 3, is amended to read:

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~~ may not approve any written policy that provides for random or ~~arbitrary~~ criteria-based testing of any employment position that the employer has failed to demonstrate meets the requirements of section 684, subsection 3.

Sec. 38. 26 MRSA §686, sub-§1, ¶B-1 is enacted to read:

B-1. An employer shall notify the department in writing if the employer intends to discontinue an approved substance use testing policy. The notice must include the anticipated effective date of the discontinuation. Once the discontinuation is approved by the department, the employer must be put into an inactive status and may not conduct substance use testing, unless mandated by federal law to test employees. An employer that has discontinued an approved substance use testing policy shall notify the department in writing if the employer chooses to reinstate a prior approved substance use testing policy.

Sec. 39. 26 MRSA §686, 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~~ reasonable suspicion policies and provide for expedited approval and registration for employers adopting such model policies. The rules adopted under this paragraph are routine technical rules pursuant to Title 5, chapter 375, subchapter ~~H-A~~ 2-A.

Sec. 40. 26 MRSA §690, sub-§3, as amended by PL 2017, c. 407, Pt. A, §113, is further amended to read:

3. Random or ~~arbitrary~~ criteria-based testing. Indicate those employers whose substance use testing policies permit random or ~~arbitrary~~ criteria-based testing under section 684, subsection 3, and describe the employment positions subject to such random or ~~arbitrary~~ criteria-based testing;