HOUSE DOCKET, NO. FILED ON: 1/14/2009

**HOUSE . . . . . . . . . . . . . . No.**

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The Commonwealth of Massachusetts

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PRESENTED BY:

**Anne M. Gobi (BY REQUEST)**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General
 Court assembled:*

 The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act to prevent private employers and state government to require drug testing as a condition of employment, work of any nature, within Commonwealth of Massachusetts Republic.

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

PETITION OF:

|  |  |
| --- | --- |
| Name: | District/Address: |
| Steven R. Drury | 18 Drury LaneTempleton, MA 01468 |

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 1792 OF 2007-2008.]

The Commonwealth of Massachusetts

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**In the Year Two Thousand and Nine**

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An Act to prevent private employers and state government to require drug testing as a condition of employment, work of any nature, within Commonwealth of Massachusetts Republic.

 *Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

Notice

(a) The commissioner of labor shall develop and distribute to each employer a standard notice as provided in this section. Each notice shall be in clear and understandable language and shall include:

(1) a summary of this subchapter;

(2) that an employee, in order to receive the protections of this subchapter, must report, pursuant to law the employer, to the supervisor, or to the person designated to receive notifications; and other

(3) a space for the name, title, and contact information of the person to whom the employee must make a report

(b) No later than January 01 2010 each employer shall post the notice in the employer's place of business to inform the employees of their protections and obligations under this subchapter. The employer shall post the notice in a prominent and accessible location in the workplace. The employer shall indicate on the notice the name or title of the individual the employer has designated to receive notifications pursuant to this law

(c) An employer who violates this section by not posting the notice as required is liable for a civil fine of $500.00 for each day of willful violation.

Definitions

As used in this subchapter:

(1) "Applicant for employment" means an individual seeking or being sought for employment with an employer.

(2) "Designated laboratory" means a laboratory designated by the department of health

(3) "Drug" means a drug listed or classified by the U.S. Drug Enforcement Administration as a Schedule I drug, or its metabolites, and alcohol. It shall also mean other drugs or their metabolites which are must be shown to cause impairment of the individual on the job, which are: amitriptyline, amphetamines, barbiturates, benzodiazepines, cocaine, doxepin, glutethimide, hydromorphone, imipramine, meperidine, methadone, methaqualone, opiates, oxycodone, pentazocine, phenytoin, phencyclidine, phenothiazines, and propoxyphene. In addition, the commissioner of health may Not add drugs to this list not recognized .

(4) "Drug test" means the procedure of taking and analyzing body fluids or materials from the body for the purpose of detecting the presence of a regulated drug as defined under MGL a drug as defined

(5) "Employee" means any person who may be permitted, required or directed by any employer, in consideration of direct or indirect gain or profit, to perform services.

(6) "Employer" means any individual, organization, or governmental body including partnership, association, trustee, estate, corporation, joint stock company, insurance company or legal representative, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, and any common carrier by mail, motor, water, air or express company doing business in or operating within this state, which has one or more individuals performing services for it within this state, or which has offered or may offer employment to one or more individuals.

(7) "Employment agency" means a person who undertakes, with or without compensation, to procure, refer, recruit or place for an employer or person, the opportunity to work for an employer.

(8) "Collector" means an individual certified by a United States Health and Human Services approved collector certification program for each type of specimen to be collected. A "collector" shall be recertified every three years and may not be an employee of the employer for the purposes of performing a drug test based on probable cause.

Drug testing of applicants; prohibitions; exceptions

(a) General prohibition. Except as provided in subsection (b) of this section, an employer or an employment agency shall not, as a condition of employment, do any of the following:

(1) Request or require that an applicant for employment take or submit to a drug test.

(2) Administer or attempt to administer a drug test to an applicant for employment.

(3) Request or require that an applicant for employment consent, directly or indirectly, to a practice prohibited under this subchapter.

(b) Exception. An employer may require an applicant for employment to submit to a drug test only if all of the following conditions are met:

(1) Conditional offer of employment. The applicant has been given an offer of employment conditioned on the applicant receiving a negative test result.

(2) Notice. The applicant received written notice of the drug testing procedure and a list of the drugs to be tested. The notice shall also state that therapeutic levels of medically-prescribed drugs tested will not be reported. The notice required under this subdivision may not be waived by the applicant.

(3) Administration. The drug test is administered in accordance with MGL section of this title.

Drug testing of employees; prohibitions; exceptions

(a) General prohibition. Except as provided in subsection (c) of this section, an employer shall not, as a condition of employment, promotion or change of status of employment, or as an expressed or implied condition of a benefit or privilege of employment, do any of the following:

(1) Request or require that an employee take or submit to a drug test.

(2) Administer or attempt to administer a drug test to an employee.

(3) Request or require that an employee consent, directly or indirectly, to a practice prohibited under this subchapter.

(b) Random or company-wide tests. An employer shall not request, require or conduct random or company-wide drug tests except when such testing is required by federal law or regulation.

(c) Exception. Notwithstanding the prohibition in subsection (a) of this section, an employer may require an individual employee to submit to a drug test if all the following conditions are met:

(1) Probable cause. The employer or an agent of the employer has probable cause to believe the employee is using or is under the influence of a drug on the job The employer or agent thereof must file a sign affidavit and make such a perminet employee record .sign and witness descibing the acts , Time , place, and one copy shall be given to employee and one for employer as matter of record

(2) Employee assistance program. The employer has available for the employee tested a bona fide rehabilitation program for alcohol or drug abuse and such program is provided by the employer or is available to the extent provided by a policy of health insurance or under contract by a nonprofit hospital service corporation.

(3) Employee may not be terminated. The employee may not be terminated if the test result is positive and the employee agrees to participate in and then successfully completes the employee assistance program; however, the employee may be suspended only for the period of time necessary to complete the program, but in no event longer than three months. The employee may be terminated if, after completion of an employee assistance program, the employer subsequently administers a drug test in compliance with subdivisions (1) and (4) of this subsection and the test result is positive.

(4) Administration of test. The drug test is administered in accordance with MGL

Administration of tests

An employer may request an applicant for employment or an employee to submit to a drug test pursuant to this subchapter, provided the drug testing is performed in compliance with all the following requirements:

(1) Drugs to be tested. The test shall be administered only to detect the presence of alcohol or drugs, as defined in subdivision 511(3) of this title, at nontherapeutic levels.

(2) Written policy. The employer shall provide all persons tested with a written policy that identifies the circumstances under which persons may be required to submit to drug tests, the particular test procedures, the drugs that will be screened, a statement that over-the-counter medications and other substances may result in a positive test and the consequences of a positive test result. The employer's policy shall incorporate all provisions of this section.

(3) Blood samples. An employer may not request or require that a blood sample be drawn for the purpose of administering a drug test.

(4) Designated laboratory. The employer shall use only a laboratory designated by the department of health.

(5) Chain of custody. The collector shall establish a chain of custody procedure for both sample collection and testing that will assure the anonymity of the individual being tested and verify the identity of each sample and test result.

(6) Urinalysis procedure. If a urinalysis procedure is used to screen for drugs, the employer shall:

(A) require the laboratory performing the test to confirm any sample that tests positive by testing the sample by gas chromatography with mass spectrometry or an equivalent scientifically accepted method that provides quantitative data about the detected drug or drug metabolites; and

(B) provide the person tested with an opportunity, at his or her request and expense, to have a blood sample drawn at the time the urine sample is provided, and preserved in such a way that it can be tested later for the presence of drugs.

(7) Laboratory reports. A laboratory may report that a urine sample is positive only if both the initial test and confirmation test are positive for the particular drug. Test results shall only be provided by written report in accordance with subdivision (9) of this section.

(8) Negative test results. The detection of a drug at a therapeutic level as defined by the commissioner of health shall be reported as a negative test result. The laboratory's report shall not contain any information indicating the presence of a drug at a therapeutic level as defined by the commissioner.

(9) Information to be supplied. The laboratory shall provide the medical review officer with a written report of the drug test result. The medical review officer shall review the report, and discuss the results and options available with the individual tested. The written report shall include all of the following information:

(A) The unique identifier code of the person tested.

(B) The type of test conducted for both initial screening and confirmation.

(C) The results of each test.

(D) The detection level, meaning the cut-off or measure used to distinguish positive and negative samples, on both the initial screening and confirmation procedures.

(E) The name and address of the laboratory.

(F) Any other information provided by the laboratory concerning that person's test.

(10) Preservation of samples. The collector shall ensure that a portion of any positive sample is preserved in a condition that will permit accurate retesting for a period of not less than 90 days after the person tested receives the result.

(11) Medical review officer. The employer shall contract with or employ a certified medical review officer who shall be a licensed physician with knowledge of the medical use of prescription drugs and the pharmacology and toxicology of illicit drugs. The medical review officer shall review and evaluate all drug test results, assure compliance with this section of this drug testing law , report the results of all tests to the individual tested, and report only confirmed drug test results to the employer.

(12) Collector. The employer shall designate a collector to collect specimens from job applicants and employees. The collector may be an employee for the purposes of collecting specimens from job applicants. The collector may not be an employee for the purposes of collecting specimens from employees for drug testing based on probable cause.

Positive test results; opportunity to retest

(a) A medical review officer shall contact personally an employee , applicant who has a positive test result and explain the results and why the results may not be accurate. and allow testing by blood at that said time

(b) The medical review officer shall provide any applicant or employee who has a positive test result with an opportunity to retest a portion of the sample at an independent laboratory at the expense of the person tested and shall consider the results of the retest. or a blood test shall be allowed by opption of the applicant or employee , not by employer

Confidentiality

(a) Any health care information about an individual to be tested shall be taken only by a medical review officer and shall be confidential and shall not be released to anyone except the individual tested, and may not be obtained by court order or process, except as provided in this subchapter in relation to any problem to cause suit by the employee or other

(b) Employers, medical review officers, laboratories and their agents, who receive or have access to information about drug test results, shall keep all information confidential. Release of such information under any other circumstance shall be solely pursuant to a written consent form signed voluntarily by the person tested, except where such release is compelled by a court of competent jurisdiction in connection with an action brought under this subchapter. A medical review officer shall not reveal the identity of an individual being tested to any person, including the laboratory.

(c) If information about drug test results is released contrary to the provisions of this subchapter, it shall be inadmissible as evidence in any judicial or quasi-judicial proceeding, except in a court of competent jurisdiction in connection with an action brought under this subchapter

Designated laboratory; rule making authority of the commissioner

(a) The department of health shall designate laboratories to test body fluids or materials for drugs. Such laboratories must be able to document competency in regard to personnel, quality assurance programs, methodology and equipment, on site confirmation of positive screening tests, security, confidentiality and expert testimony.

(b) A laboratory that fails to comply with the provisions of this subchapter relating to the confirmation and reporting of test information and the release of confidential information shall lose its designation under this subsection.

(c) The commissioner of health shall adopt rules pursuant to this law and too establishing nontherapeutic levels of therapeutic drugs by establishing a range of values considering average medical use for each particular drug or metabolite authorized to be tested under this subchapter.The levels must come to show and would give proof of on the job impairment

Enforcement

(a) Private right of action.is protect , An applicant or employee aggrieved by a violation of this subchapter may bring a civil action for injunctive relief, damages, court costs and attorney's fees.

(b) Burden of proof. In a private right of action alleging that an employer has violated this subchapter, the employer has the burden of proving that the requirements of of said sections of this Law have been satisfied. In any civil action alleging that a laboratory has violated the reporting or confidentiality sections of this subchapter, the laboratory shall have the burden of proving that the requirements of sections confidentiality of this law have been satisfied.

(c) State action to obtain civil penalty. A person who violates any provision of this this law shall be subject to a civil penalty of not less than $500.00 nor more than $2,500.00.

(d) State action to obtain criminal penalty. A person who knowingly violates any provision of this law shall be fined not less than $500.00 nor more than $2,500.00 or shall be imprisoned not more than 12 months, or both.

Transitory provisions

(a) the commissioner of health pursuant to set nontherapeutic levels of therapeutic drugs by establishing a range of values by considering average medical use for each particular drug or metabolite authorized to be tested under this subchapter.

(b) , the test shall be administered to detect the presence of alcohol or drugs as defined in subdivision this law insofar as they apply to testing only for nontherapeutic levels shall take effect when the law is enacted

(c) if an applicant receives a positive test result and has a valid predated prescription for the drug tested, the positive test result may not in and of itself be sufficient reason for not hiring an applicant., if an employee receives a positive test result and has a valid predated prescription for the drug tested, the positive test result may not in and of itself be sufficient reason for requiring that the employee participate in an employee assistance program or for disciplining or dismissing the employee.

(d) The commissioner of health on or before January 1 ,2010 shall issue a progress report to the house and senate committees on general affairs on the ability of the commissioner to comply with subsection (a) of this section.