

HOUSE No.

The Commonwealth of Massachusetts

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:

Steven R. Drury

DISTRICT/ADDRESS:

18 Drury Lane
Templeton, 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:*

1 Notice

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

4 (1) a summary of this subchapter;

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

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

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

15 (c) An employer who violates this section by not posting the notice as required is liable for a civil fine of
16 \$500.00 for each day of willful violation.

17 Definitions

18 As used in this subchapter:

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

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

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

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

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

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

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

43 (8) "Collector" means an individual certified by a United States Health and Human Services
44 approved collector certification program for each type of specimen to be collected. A "collector"

45 shall be recertified every three years and may not be an employee of the employer for the
46 purposes of performing a drug test based on probable cause.

47 Drug testing of applicants; prohibitions; exceptions

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

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

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

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

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

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

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

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

63 Drug testing of employees; prohibitions; exceptions

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

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

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

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

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

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

75 (1) Probable cause. The employer or an agent of the employer has probable cause to believe the
76 employee is using or is under the influence of a drug on the job. The employer or agent thereof
77 must file a sworn affidavit and make such a permanent employee record, sign and witness, describing
78 the acts, time, place, and one copy shall be given to employee and one for employer as matter
79 of record.

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

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

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

92 Administration of tests

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

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

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

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

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

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

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

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

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

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

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

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

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

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

131 (C) The results of each test.

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

134 (E) The name and address of the laboratory.

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

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

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

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

149 Positive test results; opportunity to retest

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

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

157 Confidentiality

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

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

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

172 Designated laboratory; rule making authority of the commissioner

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

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

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

184 Enforcement

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

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

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

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

197 Transitory provisions

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

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

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

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