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Introduced and read first time: February 2, 2005

Assigned to: Economic Matters

A BILL ENTITLED

1 AN ACT concerning

2 **Health - Job-Related Drug Testing - Breath Tests for Alcohol**

3 FOR the purpose of authorizing certain employers who require certain job-related
4 drug testing to test a breath specimen using a certain alcohol measurement
5 device; requiring that a certain device be operated by a breath alcohol technician
6 qualified under certain standards; requiring a certain test to be conducted in a
7 certain order and manner; establishing a certain alcohol concentration level to
8 be considered a positive result on a certain test; requiring an employer to
9 provide certain employees or contractors with certain information if the
10 employee or contractor tests positive on a certain test; providing for a certain
11 exception from a provision that allows certain persons to request independent
12 testing of a certain specimen; authorizing the Department of Health and Mental
13 Hygiene to adopt certain regulations; altering the definition of "medical review
14 officer" so as to require certification by certain professional organizations;
15 defining certain terms; and generally relating to authorizing employers to use
16 breath tests for testing the presence of alcohol for job-related drug testing.

17 BY repealing and reenacting, with amendments,
18 Article - Health - General
19 Section 17-214
20 Annotated Code of Maryland
21 (2000 Replacement Volume and 2004 Supplement)

22 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
23 MARYLAND, That the Laws of Maryland read as follows:

24 **Article - Health - General**

25 17-214.

26 (a) In this section the following words have the meanings indicated.

1 (1) "Alcohol or controlled dangerous substance testing" means a
2 procedure used to determine whether or not a specimen contains a controlled
3 dangerous substance or alcohol.

4 (2) "Certification" means the approval granted by the Department for a
5 laboratory to engage in job-related alcohol or controlled dangerous substance testing.

6 (3) "Controlled dangerous substance" has the meaning stated in § 5-101
7 of the Criminal Law Article.

8 (4) "EVIDENTIAL BREATH MEASUREMENT DEVICE" MEANS AN
9 INSTRUMENT THAT MEASURES THE ALCOHOL CONCENTRATION LEVEL IN AN
10 INDIVIDUAL'S BREATH AND THAT:

11 (I) IS EASILY PORTABLE AND CAN BE ADMINISTERED AT A WORK
12 SITE OR OTHER APPROPRIATE TESTING SITE; AND

13 (II) IS LISTED ON THE FEDERAL NATIONAL HIGHWAY TRAFFIC
14 SAFETY ADMINISTRATION CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH
15 MEASUREMENT DEVICES.

16 [(4)] (5) "Job applicant" means an individual who:

17 (i) Has applied for a position with an employer; and

18 (ii) Is not currently employed by the employer.

19 [(5)] (6) "Job-related" means any alcohol or controlled dangerous
20 substance testing used by an employer for a legitimate business purpose.

21 [(6)] (7) "Laboratory" means a facility or other entity that conducts
22 job-related alcohol or controlled dangerous substance testing.

23 [(7)] (8) "Medical review officer" means a licensed physician with
24 knowledge of drug abuse disorders and drug and alcohol testing WHO IS CERTIFIED
25 BY:

26 (I) THE AMERICAN ASSOCIATION OF MEDICAL REVIEW OFFICERS;
27 OR

28 (II) THE MEDICAL REVIEW OFFICER CERTIFICATION COUNCIL.

29 [(8)] (9) "Preliminary screening procedure" means a controlled
30 dangerous substance test that uses a single-use test device that:

31 (i) Is easily portable and can be administered at a work site or
32 other appropriate collection site;

33 (ii) Meets the requirements of the federal Food and Drug
34 Administration for commercial distribution; and

1 (iii) Meets generally accepted cutoff levels such as those in the
2 federal Substance Abuse and Mental Health Services Administration Guidelines for
3 drug-free workplace testing programs.

4 [(9)] (10) "Single-use test device" means the reagent-containing unit of a
5 test system that:

6 (i) Is in the form of a sealed container or cartridge that has a
7 validity check, a nonresealable closure, or an evidentiary tape that ensures detection
8 of any tampering;

9 (ii) Is self-contained and individually packaged;

10 (iii) Is discarded after each test; and

11 (iv) Does not allow any test component or constituent of a test
12 system to interact between tests.

13 [(10)] (11) "Specimen" means:

14 (i) Blood derived from the human body;

15 (ii) Urine derived from the human body;

16 (iii) Hair derived from the human body as provided in subsection
17 (b)(2) of this section; [or]

18 (iv) Saliva derived from the human body; OR

19 (V) BREATH DERIVED FROM THE HUMAN BODY BY FORCED
20 EXHALATION FROM THE LUNGS.

21 (b) (1) Except as provided in [paragraph] PARAGRAPHS (2) AND (4) of this
22 subsection, an employer who requires any person to be tested for job-related reasons
23 for the use or abuse of any controlled dangerous substance or alcohol shall:

24 (i) Have the specimen tested by a laboratory that:

25 1. Holds a permit under this subtitle; or

26 2. Is located outside of the State and is certified or otherwise
27 approved under subsection (f) of this section; and

28 (ii) At the time of testing, at the person's request, inform the person
29 of the name and address of the laboratory that will test the specimen.

30 (2) (i) 1. Except as provided in sub-subparagraph 2 of this
31 subparagraph, an employer may use a preliminary screening procedure to test a job
32 applicant for the use or abuse of any controlled dangerous substance.

1 (IV) IF THE SCREENING TEST AND CONFIRMATION TEST SHOW
2 THAT AN EMPLOYEE'S OR CONTRACTOR'S BREATH SPECIMEN IS POSITIVE FOR AN
3 ALCOHOL CONCENTRATION LEVEL AT OR ABOVE 0.02, THE EMPLOYEE OR
4 CONTRACTOR SHALL BE OFFICIALLY CONSIDERED POSITIVE FOR ALCOHOL ABUSE.

5 (V) IF AN EMPLOYEE OR CONTRACTOR TESTS POSITIVE FOR
6 ALCOHOL ABUSE, THE EMPLOYER SHALL PROVIDE THE EMPLOYEE OR CONTRACTOR:

7 1. A WRITTEN COPY OF THE EVIDENTIAL BREATH
8 MEASUREMENT DEVICE TEST INDICATING THE TEST RESULTS;

9 2. A COPY OF THE EMPLOYER'S WRITTEN POLICY ON THE
10 USE OR ABUSE OF CONTROLLED DANGEROUS SUBSTANCES OR ALCOHOL BY
11 EMPLOYEES, CONTRACTORS, OR OTHER PERSONS;

12 3. IF NECESSARY FOR THE HEALTH OR SAFETY OF THE
13 EMPLOYEE, CONTRACTOR, OR ANY OTHER PERSON, IMMEDIATE VERBAL NOTICE OF
14 THE EMPLOYER'S DISCIPLINARY ACTION; AND

15 4. WRITTEN NOTICE OF THE EMPLOYER'S DISCIPLINARY
16 ACTION AND EMPLOYER'S INTENT TO TAKE FURTHER DISCIPLINARY ACTION,
17 TERMINATE EMPLOYMENT, OR CHANGE THE CONDITIONS OF CONTINUED
18 EMPLOYMENT.

19 (c) (1) An employer who requires any employee, contractor, or other person
20 to be tested for job-related reasons for the use or abuse of any controlled dangerous
21 substance or alcohol and who receives notice from the laboratory under subsection (b)
22 of this section that an employee, contractor, or other person has tested positive for the
23 use or abuse of any controlled dangerous substance or alcohol shall, after
24 confirmation of the test result, provide the employee, contractor, or other person with:

25 (i) A copy of the laboratory test indicating the test results;

26 (ii) A copy of the employer's written policy on the use or abuse of
27 controlled dangerous substances or alcohol by employees, contractors, or other
28 persons;

29 (iii) If applicable, written notice of the employer's intent to take
30 disciplinary action, terminate employment, or change the conditions of continued
31 employment; and

32 (iv) A statement or copy of the provisions set forth in subsection (e)
33 of this section permitting an employee to request independent testing of the same
34 sample for verification of the test result.

35 (2) The information required to be provided to the employee, contractor,
36 or other person under paragraph (1) of this subsection shall be delivered to the
37 employee, contractor, or other person:

38 (i) Either in person or by certified mail; and

1 (ii) Within 30 days from the date the test was performed.

2 (d) An employer that uses a preliminary screening procedure to test
3 specimens for the use or abuse of a controlled dangerous substance under this section
4 shall:

5 (1) In using a single-use test device, collect, handle, store, and ship each
6 specimen in a manner that:

7 (i) Maintains the specimen donor's identity and confidentiality and
8 the physical integrity of the specimen; and

9 (ii) Precludes contamination of the specimen; and

10 (2) Maintain a written record of the chain of custody of each specimen
11 from the time that the specimen is collected until the time that the specimen is no
12 longer needed for retesting.

13 (e) (1) [A] EXCEPT FOR A PERSON TESTED UNDER SUBSECTION (B)(4) OF
14 THIS SECTION, A person who is required to submit to job-related testing, under
15 subsection (b) or (c) of this section, may request independent testing of the same
16 specimen for verification of the test results by a laboratory that:

17 (i) Holds a permit under this subtitle; or

18 (ii) If located outside of the State, is certified or otherwise approved
19 under subsection (f) of this section.

20 (2) The person shall pay the cost of an independent test conducted under
21 this subsection.

22 (f) (1) The Department of Health and Mental Hygiene:

23 (i) Shall adopt regulations governing the certification of
24 laboratories that conduct job-related alcohol or controlled dangerous substance
25 testing; and

26 (ii) May adopt regulations governing the oversight of [preliminary
27 screening] THE FOLLOWING procedures administered by employers:

28 1. PRELIMINARY SCREENING; AND

29 2. ALCOHOL TESTING USING AN EVIDENTIAL BREATH
30 MEASUREMENT DEVICE.

31 (2) In addition to any other laboratory standards, the regulations shall:

32 (i) Require that the laboratory comply with the guidelines for
33 laboratory accreditation, if any, as set forth by the College of American Pathologists,
34 the U.S. Health Care Financing Administration (HCFA), or any other government

1 agency or program designated to certify or approve a laboratory that is acceptable to
2 the Secretary;

3 (ii) Require that a laboratory performing confirmation tests, for
4 controlled dangerous substances or alcohol be inspected and accredited in forensic
5 drug analysis by the College of American Pathologists, the U.S. Health Care
6 Financing Administration (HCFA), or any other government agency or program
7 designated to inspect and accredit a laboratory that is acceptable to the Secretary;

8 (iii) Require that, if the laboratory performs job-related drug
9 testing, the laboratory be a participant in a program of proficiency testing of drug
10 screening conducted by an organization acceptable to the Secretary;

11 (iv) Require that the laboratory comply with standards regarding
12 cutoff levels for positive testing that are established by the United States Department
13 of Health and Human Services or established by the Secretary as mandatory
14 guidelines for workplace drug testing programs; and

15 (v) Include procedures for annual recertification and inspection.

16 (g) This section does not apply to:

17 (1) Alcohol or controlled dangerous substance testing of a person under
18 arrest or held by a law enforcement or correctional agency;

19 (2) Alcohol testing procedures conducted by a law enforcement or
20 correctional agency on breath testing equipment certified by the State Toxicologist; or

21 (3) Controlled dangerous substance testing by a laboratory facility of a
22 law enforcement or correctional agency that maintains laboratory testing standards
23 comparable to the standards in this section.

24 (h) This section applies to job-related alcohol and controlled dangerous
25 substance testing of any person, including preemployment applicants, employees, and
26 contractors.

27 (i) (1) Except as provided in paragraphs (2) and (3) of this subsection, in the
28 course of obtaining information for, or as a result of, conducting job-related alcohol or
29 controlled dangerous substance testing for an employer under this section, a
30 laboratory, a physician, including a physician retained by the employer, or any other
31 person may not reveal to the employer information regarding:

32 (i) The use of a nonprescription drug, excluding alcohol, that is not
33 prohibited under the laws of the State; or

34 (ii) The use of a medically prescribed drug, unless the person being
35 tested is unable to establish that the drug was medically prescribed under the laws of
36 the State.

1 (2) The prohibitions against disclosure of information under paragraph
2 (1) of this subsection do not apply to the extent that they prevent a person from
3 complying with the applicable provisions of the federal Commercial Motor Vehicle
4 Safety Act of 1986 and the federal Motor Carrier Safety Regulations.

5 (3) The prohibitions against disclosure of information under paragraph
6 (1) of this subsection do not apply if, prior to the administration of a preliminary
7 screening for controlled dangerous substances, the test operator notifies the applicant
8 that if the preliminary test is positive, the applicant may voluntarily disclose and
9 provide documentation to the operator that the applicant is taking a legally
10 prescribed medication.

11 (j) (1) An employer using preliminary screening procedures to test job
12 applicants under this section shall have a medical review officer review a positive test
13 result after laboratory confirmation of the positive test result.

14 (2) The employer may contract for the services of an outside medical
15 review officer if the employer does not have a medical review officer on staff.

16 (k) (1) An employer using preliminary screening procedures shall establish
17 a program to train individuals to collect specimens and perform controlled dangerous
18 substance tests in the workplace.

19 (2) The employer may designate an employee or any other individual to
20 be trained, including any individual employed by a medical laboratory designated
21 under subsection (b)(2)(v) of this section who will perform preliminary screening
22 procedures for the employer.

23 (3) A trainee shall receive appropriate and practical instruction, which
24 includes:

25 (i) A reading of the test manufacturer's package insert sheet;

26 (ii) Observing the test manufacturer's training video or receiving
27 training from the test manufacturer;

28 (iii) Completing the test manufacturer's self-administered test; and

29 (iv) The actual performance of tests and the actual interpretation of
30 the results.

31 (4) (i) The employer shall:

32 1. Keep a record of the training received by each trainee; and

33 2. Establish a procedure for training each trainee as having
34 received the minimum training required to properly perform the test.

1 (ii) After the trainee has demonstrated competency in performing
2 the test, the employer shall maintain documentation that indicates that the trainee
3 has been trained under this section.

4 (i) The provisions of a collective bargaining agreement that concern drug
5 testing override and preempt the provisions of this section that authorize an employer
6 to use a preliminary screening procedure to test a job applicant.

7 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
8 October 1, 2005.