

HOUSE BILL 743

J1
HB 299/06 – ECM

71r1809

By: **Delegates Myers, Bates, Beitzel, Kelly, McKee, Shank, and Stull**
Introduced and read first time: February 8, 2007
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; providing for a certain exception from a provision that allows certain
6 persons to request independent testing of a certain specimen; authorizing the
7 Department of Health and Mental Hygiene to adopt certain regulations;
8 altering certain definitions; defining a certain term; making stylistic changes;
9 and generally relating to authorizing employers to use breath tests for testing
10 the presence of alcohol for job-related drug testing.

11 BY repealing and reenacting, with amendments,
12 Article – Health – General
13 Section 17–214
14 Annotated Code of Maryland
15 (2005 Replacement Volume and 2006 Supplement)

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

18 **Article – Health – General**

19 17–214.

20 (a) (1) In this section the following words have the meanings indicated.

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 (2) “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 (3) “Certification” means the approval granted by the Department for
5 a laboratory to engage in job-related alcohol or controlled dangerous substance
6 testing.

7 (4) “Controlled dangerous substance” has the meaning stated in §
8 5–101 of the Criminal Law Article.

9 **(5) “EVIDENTIAL BREATH MEASUREMENT DEVICE” MEANS AN**
10 **INSTRUMENT THAT MEASURES THE ALCOHOL CONCENTRATION LEVEL IN AN**
11 **INDIVIDUAL’S BREATH AND THAT:**

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

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

17 **[(5)] (6)** “Job applicant” means an individual who:

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

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

20 **[(6)] (7)** “Job-related” means any alcohol or controlled dangerous
21 substance testing used by an employer for a legitimate business purpose.

22 **[(7)] (8)** “Laboratory” means a facility or other entity that conducts
23 job-related alcohol or controlled dangerous substance testing.

24 **[(8)] (9)** “Medical review officer” means a licensed physician with
25 knowledge of drug abuse disorders and drug and alcohol testing **WHO IS CERTIFIED**
26 **BY:**

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

1 **(II) THE MEDICAL REVIEW OFFICER CERTIFICATION**
2 **COUNCIL.**

3 **[(9)] (10)** “Preliminary screening procedure” means a controlled
4 dangerous substance test that uses a single–use test device that:

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

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

9 (iii) Meets generally accepted cutoff levels such as those in the
10 federal Substance Abuse and Mental Health Services Administration Guidelines for
11 drug–free workplace testing programs.

12 **[(10)] (11)** “Single–use test device” means the reagent–containing unit
13 of a test system that:

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

17 (ii) Is self–contained and individually packaged;

18 (iii) Is discarded after each test; and

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

21 **[(11)] (12)** “Specimen” means:

22 (i) Blood derived from the human body;

23 (ii) Urine derived from the human body;

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

26 (iv) Saliva derived from the human body; **OR**

1 **(v) BREATH DERIVED FROM THE HUMAN BODY BY FORCED**
2 **EXHALATION FROM THE LUNGS.**

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

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

7 1. Holds a permit under this subtitle; or

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

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

12 (2) (i) 1. Except as provided in [sub-subparagraph]
13 **SUBSUBPARAGRAPH 2** of this subparagraph, an employer may use a preliminary
14 screening procedure to test a job applicant for the use or abuse of any controlled
15 dangerous substance.

16 2. [Sub-subparagraph] **SUBSUBPARAGRAPH 1** of this
17 subparagraph does not apply to an employer that has entered into a collective
18 bargaining agreement that prohibits the employer from using a preliminary screening
19 procedure to test a job applicant for the use or abuse of any controlled dangerous
20 substances.

21 (ii) If the result of a preliminary screening procedure is positive,
22 the employer shall submit the specimen for testing by a laboratory as required under
23 paragraph (1) of this subsection.

24 (iii) Following voluntary disclosure and documentation by an
25 applicant of the taking of a legally prescribed medication, an employer may hire the
26 applicant pending confirmation of a positive test result by the medical laboratory and
27 review by the employer's medical review officer.

28 (iv) An employer may not use a preliminary screening procedure
29 to test an individual who is not applying for a job with that employer.

1 (v) An employer may designate a medical laboratory licensed to
2 perform job-related testing for controlled dangerous substances to also perform
3 preliminary screening procedures on job applicants for the employer.

4 (3) (i) An employer who requires any person to be tested for
5 job-related reasons for the use or abuse of any controlled dangerous substance may
6 use hair derived from the human body as a specimen in accordance with this
7 paragraph.

8 (ii) An employer may use hair derived from the human body
9 only for pre-employment purposes.

10 (iii) If an employer uses hair derived from the human body as a
11 specimen, the employer may not:

12 1. Use a specimen that is longer than one and one-half
13 inches measured from the human body; or

14 2. Use the specimen for any purpose other than testing
15 for controlled dangerous substances.

16 **(4) AN EMPLOYER THAT REQUIRES ANY PERSON TO BE TESTED**
17 **FOR JOB-RELATED REASONS FOR THE USE OR ABUSE OF ALCOHOL MAY TEST A**
18 **BREATH SPECIMEN USING AN EVIDENTIAL BREATH MEASUREMENT DEVICE.**

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

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

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

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

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

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

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

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

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

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

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

16 (ii) Precludes contamination of the specimen; and

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

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

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

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

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

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

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

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

7 **1. PRELIMINARY SCREENING; AND**

8 **2. ALCOHOL TESTING USING AN EVIDENTIAL**
9 **BREATH MEASUREMENT DEVICE.**

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

12 (i) Require that the laboratory comply with the guidelines for
13 laboratory accreditation, if any, as set forth by the College of American Pathologists,
14 the Centers for Medicare and Medicaid Services, or any other government agency or
15 program designated to certify or approve a laboratory that is acceptable to the
16 Secretary;

17 (ii) Require that a laboratory performing confirmation tests for
18 controlled dangerous substances or alcohol be inspected and accredited in forensic
19 drug analysis by the College of American Pathologists, the Centers for Medicare and
20 Medicaid Services, or any other government agency or program designated to inspect
21 and accredit a laboratory that is acceptable to the Secretary;

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

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

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

30 (g) This section does not apply to:

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

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

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

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

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

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

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

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

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

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

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

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

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

10 (3) A trainee shall receive appropriate and practical instruction, which
11 includes:

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

13 (ii) Observing the test manufacturer's training video or
14 receiving training from the test manufacturer;

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

17 (iv) The actual performance of tests and the actual
18 interpretation of the results.

19 (4) (i) The employer shall:

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

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

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

27 (l) The provisions of a collective bargaining agreement that concern drug
28 testing override and preempt the provisions of this section that authorize an employer
29 to use a preliminary screening procedure to test a job applicant.

1 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
2 October 1, 2007.