

1 HOUSE BILL NO. 242

2 INTRODUCED BY C. GLIMM

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE WORKFORCE DRUG AND ALCOHOL
5 TESTING ACT; AND AMENDING SECTIONS 39-2-206, 39-2-207, AND 39-2-208, MCA."

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7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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9 **Section 1.** Section 39-2-206, MCA, is amended to read:10 **"39-2-206. Definitions.** As used in 39-2-205 through 39-2-211, the following definitions apply:11 (1) "Alcohol" means an intoxicating agent in alcoholic beverages, ethyl alcohol, also called ethanol, or
12 the hydrated oxide of ethyl.13 (2) "Alcohol concentration" means the alcohol in a volume of breath expressed in terms of grams of
14 alcohol per 210 liters of breath, as indicated by an evidential breath test.15 (3) "Alcohol screening device" means a breath or saliva testing device, other than an evidential breath
16 testing device, that is approved by the national highway traffic safety administration and placed by the
17 administration on its conforming products list for screening devices.18 ~~(3)(4) "Controlled substance" means a dangerous drug, as defined in 49 CFR, part 40, except a drug~~
19 ~~used pursuant to a valid prescription or as authorized by law~~ any substance defined as a dangerous drug
20 pursuant to Title 50, chapter 32, parts 1 and 2.21 ~~(4)(5) (a) "Employee" means an individual engaged in the performance, supervision, or management~~
22 ~~of work in a:~~

23 (i) hazardous work environment;

24 (ii) security position; or

25 (iii) position:

26 (A) affecting public safety or public health;

27 (B) in which driving a motor vehicle is necessary for any part of the individual's work duties; or

28 (C) involving a fiduciary responsibility for an employer.

29 (b) The term does not include an independent contractor or an elected official who serves on the
30 governing body of a local government.

1 ~~(5)~~(6) (a) "Employer" means a person or entity that has one or more employees and that is located in
2 or doing business in Montana.

3 (b) The term includes the governing body of a local government.

4 ~~(6)~~(7) "Governing body" means the legislative authority of a local government.

5 ~~(7)~~(8) "Hazardous work environment" includes but is not limited to positions:

6 (a) for which controlled substance and alcohol testing is mandated by federal law, such as aviation,
7 commercial motor carrier, railroad, pipeline, and commercial marine employees;

8 (b) that involve the operation of or work in proximity to construction equipment, industrial machinery, or
9 mining activities; ~~or~~

10 (c) that involve handling or proximity to flammable materials, explosives, toxic chemicals, or similar
11 substances; or

12 (d) that involve operating, running, maneuvering, navigating, or driving vehicles or mechanized
13 equipment such as forklifts, passenger vehicles, aircraft, watercraft, or other mechanized conveyances.

14 ~~(8)~~(9) "Local government" means a city, town, county, or consolidated city-county.

15 ~~(9)~~(10) "Medical review officer" means a licensed physician trained in the field of substance abuse.

16 ~~(10)~~(11) "Prospective employee" means an individual who has made a written or oral application to an
17 employer to become an employee.

18 ~~(11)~~(12) "Qualified testing program" means a program to test for the presence of controlled substances
19 and alcohol that meets the criteria set forth in 39-2-207 and 39-2-208.

20 ~~(12)~~(13) "Sample" means a urine specimen, a breath test, blood, ~~or~~ oral fluid, or hair obtained in a
21 minimally invasive manner ~~and determined to meet the reliability and accuracy criteria accepted by laboratories~~
22 ~~for the performance of drug testing that is used to determine the presence of a controlled substance or alcohol."~~

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24 **Section 2.** Section 39-2-207, MCA, is amended to read:

25 **"39-2-207. Qualified testing program.** A qualified testing program must comply with the following
26 criteria:

27 (1) Testing must be conducted according to the terms of written policies and procedures that must be
28 adopted by the employer and must be available for review by all employees 60 days before the terms are
29 implemented or changed. ~~Controlled substance and alcohol testing procedures for samples that are covered by~~
30 ~~49 CFR, part 40, must conform to 49 CFR, part 40. For samples that are not covered by 49 CFR, part 40, the~~

1 ~~qualified testing program must contain chain-of-custody and other procedural requirements that are at least as~~
2 ~~stringent as those contained in 49 CFR, part 40, and the testing methodology must be cleared by the United~~
3 ~~States food and drug administration.~~ At a minimum, the policies and procedures must require:

4 (a) a description of the applicable legal sanctions under federal, state, and local law for the unlawful
5 manufacture, distribution, possession, or use of a controlled substance;

6 (b) the employer's program for regularly educating or providing information to employees on the health
7 and workplace safety risks associated with the use of controlled substances and alcohol;

8 (c) the employer's standards of conduct that regulate the use of controlled substances and alcohol by
9 employees;

10 (d) a description of available employee assistance programs, including drug and alcohol counseling,
11 treatment, or rehabilitation programs that are available to employees;

12 (e) a description of the sanctions that the employer may impose on an employee if the employee is found
13 to have violated the standards of conduct referred to in subsection (1)(c) or if the employee is found to test
14 positive for the presence of a controlled substance or alcohol;

15 (f) identification of the types of controlled substance and alcohol tests to be used from the types of tests
16 listed in 39-2-208;

17 (g) a list of controlled substances for which the employer intends to test and a stated alcohol
18 concentration level above which a tested employee must be sanctioned;

19 (h) a description of the employer's hiring policy with respect to prospective employees who test positive;

20 (i) a detailed description of the procedures that will be followed to conduct the testing program, including
21 the resolution of a dispute concerning test results;

22 (j) a provision that all information, interviews, reports, statements, memoranda, and test results are
23 confidential communications that may not be disclosed to anyone except:

24 (i) the tested employee;

25 (ii) the designated representative of the employer; or

26 (iii) in connection with any legal or administrative claim arising out of the employer's implementation of
27 39-2-205 through 39-2-211 or in response to inquiries relating to a workplace accident involving death, physical
28 injury, or property damage in excess of \$1,500, when there is reason to believe that the tested employee may
29 have caused or contributed to the accident; and

30 (k) a provision that information obtained through testing that is unrelated to the use of a controlled

1 substance or alcohol must be held in strict confidentiality by the medical review officer and may not be released
2 to the employer.

3 (2) In addition to imposing appropriate sanctions on an employee for violation of the employer's
4 standards of conduct, an employer may require an employee who tests positive on a test for controlled
5 substances or alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation
6 program as a condition of continued employment. An employer may require the employee to submit to periodic
7 followup testing as a condition of the counseling, treatment, or rehabilitation program.

8 (3) Testing must be at the employer's expense, and all employees must be compensated at the
9 employee's regular rate, including benefits, for time attributable to the testing program.

10 ~~(4) The collection, transport, and confirmation testing of urine samples must be performed in accordance~~
11 ~~with 49 CFR, part 40, and the collection, transport, and confirmation testing of nonurine samples must be as~~
12 ~~stringent as the requirements of 49 CFR, part 40, in requiring split specimens as defined by the United States~~
13 ~~department of health and human services, requiring transport to a testing facility under the chain of custody, and~~
14 ~~requiring confirmation of all screened positive results using mass spectrometry technology.~~

15 (4) (a) The collection, screening, testing, transport, and confirmatory testing of samples must be
16 performed with due regard to the privacy of the individual being tested and in a manner reasonably calculated
17 to prevent substitutions, adulteration, or any other interference with collection or testing of samples.

18 (b) Urine specimen collectors, alcohol screening device technicians, and evidential breath testing device
19 technicians must meet the requirements of 49 CFR, part 40.

20 (c) Sample processing procedures must include:

21 (i) the labeling of samples in order to preclude the possibility of misidentification of the person tested in
22 relation to the test result provided; and

23 (ii) the handling of samples in accordance with reasonable chain of custody and confidentiality processes.

24 (d) Sample testing must conform to scientifically accepted analytical methods and procedures.

25 (5) (a) Controlled substance testing must include a confirmatory test before the result of any drug test
26 may be used as a basis for employee sanctions.

27 (b) A confirmatory drug test refers to a second or additional test of a sample conducted by a laboratory
28 utilizing an analytical method combining chromatographic separation and mass spectrometric identification or
29 other reliable comparable method.

30 (c) A breath alcohol test must be confirmed by using an evidential breath testing device that is approved

1 by the national highway traffic safety administration and placed by the administration on its conforming products
 2 list or by a laboratory test of a biologic specimen such as blood or oral fluid.

3 ~~(5)~~(6) Before an employer may take any action based on a positive test result, the employer shall have
 4 the results reviewed and certified by a medical review officer who is trained in the field of substance abuse. An
 5 employee or prospective employee must be given the opportunity to provide notification to the medical review
 6 officer of any medical information that is relevant to interpreting test results, including information concerning
 7 currently or recently used prescription or nonprescription drugs.

8 ~~(6) Breath alcohol tests must be administered by a certified breath alcohol technician and may only be~~
 9 ~~conducted using testing equipment that appears on the list of conforming products published in the Federal~~
 10 ~~Register.~~

11 (7) A breath alcohol test result must indicate an alcohol concentration of greater than 0.04 for a person
 12 to be considered as having alcohol in the person's body."

13

14 **Section 3.** Section 39-2-208, MCA, is amended to read:

15 **"39-2-208. Qualified testing program -- allowable types -- procedures.** Each of the following activities
 16 is permissible in the implementation of a qualified testing program:

17 (1) An employer may test any prospective employee as a condition of hire.

18 (2) An employer may use random testing if the employer's controlled substance and alcohol policy
 19 includes one or both of the following procedures:

20 (a) An employer or an employer's representative may establish a date when all salaried and
 21 wage-earning employees will be required to undergo controlled substance or alcohol tests, or both.

22 (b) An employer may manage or contract with a third party to establish and administer a random testing
 23 process that must include:

24 (i) an established calendar period for testing;

25 (ii) an established testing rate within the calendar period;

26 (iii) a random selection process that will determine who will be tested on any given date during the
 27 calendar period for testing;

28 (iv) all supervisory and managerial employees in the random selection and testing process; and

29 (v) a procedure that requires the employer to obtain a signed statement from each employee that
 30 confirms that the employee has received a written description of the random selection process and that requires

1 the employer to maintain the statement in the employee's personnel file. The selection of employees in a random
2 testing procedure must be made by a scientifically valid method, such as a random number table or a
3 computer-based random number generator table.

4 (3) An employer may require an employee to submit to return-to-duty testing and followup tests testing
5 if the employee has had a verified positive test for a controlled substance or for alcohol. The followup tests must
6 be described in the employer's controlled substance and alcohol policy and may be conducted for up to 1 year
7 from the time that the employer first requires a followup test.

8 (4) An employer may require an employee to be tested for controlled substances or alcohol if the
9 employer has reason to suspect that an employee's faculties are impaired on the job as a result of the use of a
10 controlled substance or alcohol consumption. An employer shall comply with the supervisory training requirement
11 in 49 CFR, part 382.603, whenever the employer requires a test on the basis of reasonable suspicion.

12 (5) An employer may require an employee to be tested for controlled substances or alcohol if the
13 employer has reason to believe that the employee's act or failure to act is a direct or proximate cause of a
14 work-related accident that has caused death or personal injury or property damage in excess of \$1,500."

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