

By Mr. Kirby, petition (accompanied by bill, Senate, No. 42) of Edward P. Kirby and Associated Industries of Massachusetts, by Richard E. Mastrangelo, senior vice president and general counsel, for legislation relative to drug testing of employees and prospective employees. Commerce and Labor.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Ninety-Two.

AN ACT RELATIVE TO DRUG TESTING OF EMPLOYEES AND PROSPECTIVE EMPLOYEES.

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

1 The General Laws are hereby amended by inserting after
2 chapter 149 the following new chapter: —

3 **CHAPTER 149A.**
4 **DRUG TESTING STANDARDS.**

5 Section 1. PURPOSE

6 The purpose of this chapter is to achieve a balance between the
7 goal of a drug-free workplace and that of respect for individual
8 privacy by providing specific standards under which employers
9 may test for substance abuse using fair and reasonable detection
10 methods.

11 Section 2. DEFINITIONS

12 “Employer”, a person or entity who engages the services or
13 labor of an employee for wages or other remuneration, but does
14 not include the United States.

15 “Employee”, an individual who provides services or labor for
16 an employer for wages or other remuneration.

17 “Drug”,

18 (A) alcohol, including distilled spirits, wine, malt beverages
19 and intoxicating liquors;

20 (B) controlled substances, as defined by the U.S. Drug
21 Enforcement Administration in Schedules I-V, and metabolites.
22 [21 C.R.R. Secs. 1308.11 — 1308.15 (1974, as amended)];

23 “Drug test”, any chemical, biological or electronic test of bodily
24 fluids, administered for the purpose of determining the presence
25 or absence of drugs or their metabolites in a person’s body. The
26 term does not include an examination by a physician absent use
27 of chemical, biological or electronic means.

28 “Applicant”, a person actively seeking or being sought for
29 employment with an employer.

30 “Employee assistance program”, a program staffed by an
31 individual or individuals with expertise in dealing with drug-
32 related problems which at a minimum provides for counseling to
33 program participants to include problem assessment, evaluation,
34 referral for treatment, and follow-up procedures.

35 “Rehabilitation program”, an in-patient or out-patient program
36 licensed or certified for the purpose of treating individual drug
37 abuse, including the development, supervision and implementa-
38 tion programs for recovery.

39 “Reason to suspect”, a rebuttable presumption that an
40 employee’s job performance is being or has been affected by the
41 use of a drug when a physician, in his or her professional
42 judgement, concludes a drug test is in order.

43 Section 3. NOTICE OF DRUG TESTING.

44 Employers who engage in drug testing of applicants or
45 employees shall have a written drug testing policy. Such policy
46 shall contain —

47 (1) A general statement describing the employer’s policy on
48 employee drug use and identifying both the grounds on which an
49 employee or applicant may be required to submit to a drug test
50 and the actions the employer may take against an employee or
51 applicant on the basis of a confirmed positive test result;

52 (2) The procedures used by the employer to ensure
53 confidentiality;

54 (3) The consequences of refusing to submit to a drug test;

55 (4) A statement describing the procedure by which the
56 employer will entertain the employee’s or applicant’s explanation
57 of a confirmed positive test result;

58 (5) A description of any employee assistance program or
59 rehabilitation program that the employer may provide or support.

60 An employer shall provide written notice of its drug testing
61 policy to all affected employees and applicants prior to testing.

62 An employer shall include a statement in its application-for-
63 employment form notifying applicants as to the existence of its
64 drug testing policy.

65 The notice required by this section must be given at least thirty
66 days prior to the implementation of any drug testing program.

67 Section 4. CIRCUMSTANCES UNDER WHICH TESTING
68 PERMITTED.

69 An employee may require, as a condition of employment that
70 an applicant submit to a drug test administered in conformity with
71 section five of this chapter.

72 (1) Where the employer has "reason to suspect" that the
73 employee's job performance is being or has been affected by the
74 use of a drug.

75 (2) Where the nature of the employee's job would create a
76 significant health or safety risk to the employee, to fellow
77 employees or to the public should the employee be affected by
78 the use of a drug.

79 (3) Where the employee is participating in a drug related
80 employee assistance program or rehabilitation program and for
81 one year after completion of such program.

82 (4) Where the test is conducted pursuant to the requirements
83 of federal or state law or regulations.

84 Whenever an employee or applicant refuses to submit to a drug
85 test authorized by this section, the refusal may serve as the basis
86 for refusal to hire, or other disciplinary action by the employer,
87 up to and including termination.

88 Whenever an employee or applicant attempts to alter,
89 adulterate, substitute or otherwise tamper with the test specimen,
90 the employer may refuse to hire, or may take disciplinary action,
91 up to and including termination.

92 Notwithstanding any other provision of this chapter, an
93 employer may prohibit the use, sale or possession of drugs during
94 work hours and may discipline employees for being affected by
95 the use of drugs during work hours.

96 Section 5. TESTING STANDARDS.

97 Any sample collected as authorized by this chapter shall be
98 collected pursuant to protocols established by physicians licensed
99 to practice in the commonwealth, and which are designed to
100 ensure the purity of specimens taken by preventing interference
101 with, tampering or substitution. Such samples shall be collected,
102 labelled, stored, and transported to the place of testing so as to
103 reasonably preclude the possibility of substitution, contamination
104 or adulteration.

105 Samples shall be analyzed in a laboratory that has been certified
106 by the commissioner or accredited by the College of American
107 Pathologists. All laboratories not accredited by the College of
108 American Pathologists must be certified by the commissioner
109 within ninety days of the effective date of any rules establishing
110 certification requirements, or of the effective date of this chapter if
111 such rules have not been promulgated.

112 An employer may take action pursuant to section six only if
113 the sample collected is confirmed as positive by gas chromatog-
114 raphy with mass spectrometry or by an equivalent procedure.

115 Section 6. ACTION BASED ON POSITIVE TEST
116 RESULTS.

117 Whenever a drug test is confirmed as positive pursuant to
118 section five, an employer may use the results of that test as the
119 basis for action which includes the following: —

120 (1) a requirement that the employee participate in an employer-
121 conducted or employer-approved employee assistance or
122 rehabilitation program as a condition of continued employment:
123 or

124 (2) disciplinary action up to and including termination; or

125 (3) refusal to hire an applicant; or

126 (4) any reasonable action necessary to preserve a safe, healthy
127 and productive work environment. Such action may include, but
128 is not limited to, reassignment, transfer, suspension, or required
129 leave of absence.

130 Before an employer may take action pursuant to the preceding
131 paragraph, the employer shall inform the employee or applicant
132 tested as to the identity of the substance for which a positive test
133 was obtained and, after receipt of such information, the employee'

134 or applicant shall be provided a reasonable opportunity to explain
135 the confirmed positive test result.

136 Section 7. EMPLOYEE ASSISTANCE AND REHABILITATION.
137 TATION.

138 Prior to establishing a drug testing program for its employees
139 as authorized by this chapter, an employer must make available
140 an employee assistance program which meets the following
141 minimum criteria:

142 (1) is available to all employees;

143 (2) is described in a written statement which is available to all
144 employees; and

145 (3) provides services under a high degree of confidentiality.

146 An employer may, but is not required to, as a condition to
147 continued employment, offer to any employee whose sample tests
148 are confirmed as positive pursuant to the procedures described
149 in section five, a temporary leave of absence with or without pay
150 to participate in a rehabilitation program.

151 Section 8. CONFIDENTIALITY OF INFORMATION.

152 Absent the express written consent of the employee, applicant,
153 or legal representative thereof, any information acquired by the
154 employer relating to the administration and results of a substance
155 abuse test shall not be released to any person other than —

156 (1) the employee or applicant tested, as authorized by this
157 chapter;

158 (2) those employees of the employer with a need to know;

159 (3) providers of employee assistance programs or rehabilitation
160 programs as described in section seven of this chapter.

161 This section does not prohibit:

162 (1) The release of information described in the preceding para-
163 graph where required or permitted by federal or state law.

164 (2) The use of information described in the preceding para-
165 graph in any grievance procedure, administrative hearing or court
166 proceeding arising out of an action taken pursuant to section six.

167 Section 9. REMEDIES FOR VIOLATIONS.

168 An action to obtain relief for a violation of this chapter may
169 be brought within six months of the alleged violation or after the
170 exhaustion of any available administrative remedies, whichever
171 is later, in the superior court by a person adversely affected by
172 the alleged violation.

173 If the court finds that the employer has violated a requirement
174 of this chapter, the court may enjoin the employer from engaging
175 in such conduct, and order such affirmative action as may be
176 appropriate, including, but not limited to, reinstatement or hiring
177 of an employee, with or without back pay. Interim earnings by
178 the person or persons adversely affected by the employer's
179 violation shall operate to reduce the back pay otherwise allowable.

180 In no event shall the court award compensatory liquidated or
181 punitive damages for any violation of this chapter.

182 The court in its discretion may allow the prevailing party
183 reasonable costs of any action under this section, including
184 reasonable attorneys' fees.

185 The remedies provided for under this section shall be exclusive,
186 and no other damages based on facts which present a possible
187 violation of this act shall be authorized.

188 In any claim brought pursuant to this section, where it is alleged
189 that the employer's action was based on a false test result, there
190 shall be a rebuttable presumption that the test result was valid
191 if the employer complied with section five of this chapter.

192 No cause of action shall arise in favor of any person against
193 an employer who has established a drug testing program in
194 accordance with this chapter for:

195 (1) failure to test for drugs, or failure to test for a specific
196 substance;

197 (2) failure to test for, or if tested for, failure to detect, any
198 specific substance, disease, infectious agent, virus, or other
199 physical abnormality, problem, or defect of any kind;

200 (3) termination or suspension of a drug testing program as
201 permitted by this chapter;

202 (4) defamation of character, libel, slander, or damage to
203 reputation arising out of a drug test administered in conformity
204 with this chapter unless —

205 (a) information was disclosed to any person other than a person
206 authorized under this chapter to receive the information; and

207 (b) the information disclosed was based on a false test result;
208 and,

209 (c) the false test result was disclosed with malice.

210 It shall be a violation of this chapter for an employer to
211 discharge or in any manner discriminate against an employee or

212 applicant because said person has filed any complaint or instituted
213 or testified in any proceeding brought pursuant to this chapter.

214 Section 10. PREEXISTING PROGRAMS.

215 A drug testing program initiated prior to the effective date of
216 this chapter shall conform to the provisions of this chapter no later
217 than the said effective date.

218 Section 11. FREEDOM OF COLLECTIVE BARGAINING.

219 Nothing in this chapter shall be construed to interfere with or
220 diminish any protection already provided under a collective
221 bargaining agreement that exceeds the minimum standards of
222 employee protection provided by this chapter. In addition,
223 nothing in this chapter shall be construed to limit the freedom
224 of employees to bargain collectively for a different drug testing
225 program, so long as the protection provided by the collective
226 bargaining agreement meets or exceeds the minimum standards
227 of employee protection provided by this chapter.

228 Section 12. EFFECTIVE DATE.

229 The provisions of this act shall become effective one hundred
230 and eighty days following the date of enactment.

