

HOUSE No. 2383

By Mr. Bosley of North Adams, petition of Daniel E. Bosley and Daniel J. Valianti for legislation to protect employees in the workplace. Commerce and Labor.

The Commonwealth of Massachusetts

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

AN ACT TO PROTECT EMPLOYEES IN THE WORKPLACE.

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

1 SECTION 1. Chapter 149 of the General Laws, as appearing
2 in the 1986 Official Edition, is hereby amended by inserting after
3 section 19C the following section: —

4 Section 19D.

5 (1) Definitions: As used in this section, the following words
6 shall, unless the context requires otherwise, have the following
7 meanings: —

8 (a) "drug test", the procedure of taking and analyzing body
9 fluids or materials from the body for the purpose of detecting the
10 presence of a controlled substance, as defined in chapter 94C.

11 (b) "Employer", means any individual, organization, or
12 governmental body including partnership, association, trustee,
13 estate, corporation, joint stock company, insurance company or
14 legal representative, whether domestic or foreign, or the receiver,
15 trustee in bankruptcy, trustee or successor thereof, and any
16 common carrier by mail, motor, water, air or express company
17 doing business in or operating within this state, which has one
18 or more individuals performing services for it within this state,
19 or which has offered or may offer employment to one or more
20 individuals, unless otherwise excluded under this section.

21 (2) No employer shall require an applicant for employment to
22 submit to a drug test unless the following provisions are met:

23 (a) the applicant is informed in writing at the time of
24 application of employer's intent to conduct such a drug test; and

25 (b) the applicant is given an offer of employment conditioned
26 upon the applicant receiving a negative test result; and

27 (c) the applicant is given the opportunity to write a pre-test
28 statement regarding any factors that may influence the test results;
29 and

30 (d) the employer obtains the express written consent of any
31 applicant to perform the test and limits it to the specific substances
32 expressly identified on said consent form; and

33 (e) the test is administered in accordance with subsection 4
34 of this section.

35 (3) No employer shall require as a condition of continued
36 employment, promotion or change of status of employment, or
37 as an expressed or implied condition of a benefit or privilege of
38 employment, an employee to submit to a drug test unless the
39 provisions of paragraph (a) or paragraph (b) are met:

40 (a) [i] the employer determines there is a reasonable cause
41 based on specific, objective facts and reasonable inferences drawn
42 therefrom, in light of experience, to believe that the employee's
43 faculties are impaired on the job because of his consumption of
44 drugs, concerning which the employer has received no reasonable
45 explanation; and

46 [ii] the employer gives the employee the opportunity to
47 write a pre-test statement regarding any factors that may influence
48 the test results; and

49 [iii] the employer obtains the express written consent of
50 the employee to perform the test and limits it to the specific
51 substances expressly identified on said consent form; and

52 [iv] the test is administered in accordance with sub-
53 section 4 of this section.

54 (b) The test is administered in accordance with subsection 4
55 of this section; and

56 [i] such test is authorized under federal law; or

57 [ii] the employee gives his express written consent to be
58 monitored for exposure to toxic or unhealthy substances in the
59 workplace or in the performance of his job responsibilities,
60 provided that any such screenings or tests shall be limited to the
61 specific substances expressly identified in the employee consent
62 form; or

63 [iii] the employee serves in an occupation which has been
64 designated as a high-risk or safety sensitive occupation, pursuant
65 to regulations adopted by the commissioner of labor and
66 industries pursuant to paragraph 7 of this section; or

67 [iv] the drug test is conducted as part of an employee
68 assistance program sponsored or authorized by the employer in
69 which the employee voluntarily participates.

70 (4) The employer who administers a drug test shall comply with
71 all of the following:

72 (a) the employer shall provide all persons to be tested with
73 a written policy that identifies the circumstances under which
74 persons may be required to submit to drug tests, the particular
75 test procedures, the drugs that will be screened, a statement that
76 over-the-counter medications and other substances may result in
77 a positive test and the consequences of a positive test result. This
78 policy shall incorporate all of the provisions of this paragraph and
79 include access to an employee assistance program; and

80 (b) the employers shall not request or require that a blood
81 sample be drawn for the purpose of administering a drug test; and

82 (c) the employer, or any one acting in the interest of the
83 employer, shall not, either directly or indirectly, observe an
84 applicant or employee in the process of producing the urine
85 specimen; and

86 (d) the employer or the laboratory shall establish a chain of
87 custody procedure for both sample collection and testing that will
88 verify the identity of each sample and test result; and

89 (e) the employer shall use a laboratory which is accredited
90 for drug testing by the American Association of Clinical
91 Chemistry, Inc. or the College of American Pathologists; and

92 (f) the employer shall require the laboratory performing the
93 test to conduct the initial tests by analyzing any combination of
94 methods using immuno-chemical technology or chromatography
95 for initial screening tests, confirming any sample that has a
96 positive result by testing the said sample by a gas chromatography
97 and mass spectrometry methodology or a methodology which is
98 as reliable or more reliable and provides quantitative data about
99 the detected drug or drug metabolites; and

100 (g) the employer shall provide the person tested with an
101 opportunity, at said person's request and expense, to have a blood

102 sample drawn at the time the urine sample is provided, and
103 preserved in such a way that it can be tested later for the presence
104 of drugs; and

105 (h) the employer and the applicant or employee shall be
106 simultaneously notified by the laboratory that a urine sample is
107 positive only if the initial test and confirmatory test are positive
108 for the particular drug. Such notification shall be in writing and
109 include the following information:

110 [i] the name of the person tested; and

111 [ii] the type of test conducted for both initial screening and
112 confirmation; and

113 [iii] the results of each test; and

114 [iv] the detection level, meaning the cut-off or measure
115 used to distinguish positive and negative samples, on both the
116 initial screening and confirmation procedures; and

117 [v] name and address of the laboratory; and

118 [vi] any other information provided by the laboratory to
119 the employer concerning that person's test.

120 The detection of a drug at a therapeutic level, as defined by the
121 commissioner of public health, shall be reported as a negative test
122 result. Such negative result shall not be included in the labora-
123 tory's notification to the employer and the applicant or employee.

124 (i) the employer shall ensure that a portion of any positive
125 sample is preserved in a condition that will permit accurate
126 retesting for a period of not less than 90 days after the person
127 tested receives the result; and shall provide any applicant or an
128 employee who has a positive test result with an opportunity to
129 retest a portion of the sample at an independent laboratory at the
130 expense of the person tested and shall consider the results of the
131 retest; and

132 (j) the employer shall provide an applicant or employee who
133 has a positive test result an informal meeting to explain the results
134 and explain why the result may not be accurate.

135 (k) the employer shall provide an employee who tests
136 positive with the opportunity to participate in an employee
137 assistance program. The employer shall not dismiss an employee
138 who tests positive unless said employee refuses to participate in
139 such program, or said employee tests positive after participating
140 in such program, or said employee is dismissed for reasons
141 unrelated to this section.

142 (5) Any information concerning drug test results taken
143 pursuant to authority under this section shall be confidential and
144 shall not be released to anyone except the employer, and applicant
145 or employee. Said result may not become a part of the employees
146 personal record, as defined in section 52C of chapter 149 and may
147 not be obtained by court order or process, unless;

148 (a) an applicant or employee voluntarily signs a written
149 consent form; or

150 (b) a release is compelled by a court of competent jurisdiction
151 in connection with an action brought under this section.

152 If information about drug test results is released contrary to
153 the provisions of this section, it shall be inadmissible as evidence
154 in any judicial or quasi-judicial proceeding, except in a court of
155 competent jurisdiction in connection with an action under this
156 section.

157 (6) This section shall not restrict an employer's authority to
158 prohibit the use of drugs or alcohol during work hours, or restrict
159 an employer's authority to discipline, suspend, or dismiss an
160 employee for being under the influence of drugs or alcohol during
161 work hours.

162 (7) The commissioner shall promulgate rules and regulations
163 relative to the designation of certain occupations as high risk or
164 safety-sensitive occupations. Any employer aggrieved by the
165 decision of the commissioner shall have the right to appeal such
166 decision pursuant to Chapter 23.

167 (8) Any person who violates any provision of this section shall
168 be punished by a fine of not less than five hundred dollars nor
169 more than five thousand dollars, or by imprisonment for not more
170 than ninety days, or both.

171 In the case of a corporation, the responsible individual shall
172 be the president, chief operating officer or any managerial or
173 supervising person who allows or condones such violation.

174 (9) Any person aggrieved by a violation of this section may
175 institute within three years of such violation and prosecute in his
176 own name and on his own behalf, or for himself and for others
177 similarly situated, a civil action for injunctive relief and any
178 damages thereby incurred, including treble damages for any loss
179 of wages or other benefits. The total awarded damages shall equal
180 or exceed a minimum of five hundred dollars for each such

181 violation. A person so aggrieved and who prevails in such action
182 shall be entitled to an award of the costs of the litigation and
183 reasonable attorney fees.

184 Nothing herein shall be construed to abrogate or diminish the
185 rights which an employee or an applicant for employment has
186 under section eleven I of chapter twelve, section seventy F of
187 chapter one hundred and eleven or section one B of chapter two
188 hundred and fourteen.

1 SECTION 2. Chapter 111 of the General Laws, as appearing
2 in the 1986 Official Edition, is hereby amended by adding the
3 following section: —

4 For the purposes of drug tests, as provided for in section nine-
5 teen D of chapter one hundred and forty-nine, the commissioner
6 shall promulgate rules and regulations defining acceptable
7 therapeutic levels for the presence of such drugs.

1 SECTION 3. Nothing in this act shall be deemed to diminish
2 the rights, privileges, or remedies of any employee under any other
3 law or regulation or under any collective bargaining agreement
4 or employment contract.

