

SENATE BILL 138

Introduced by Stimatz, et al.

1/18	Introduced
1/18	Referred to Judiciary
1/19	First Reading
1/31	Hearing
2/23	Tabled in Committee

*Senate* BILL NO. *138*

INTRODUCED BY *Sen. Bob Bergeson*

*Rep. David Lowrey* *for second reading*  
*Follows Code Page*  
A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE PRIVATE

WORKFORCE DRUG TESTING ACT; ESTABLISHING CRITERIA FOR DRUG TESTING OF EMPLOYEES AND PROSPECTIVE EMPLOYEES; LIMITING THE LIABILITY OF EMPLOYERS USING QUALIFIED DRUG TESTING PROGRAMS; PROVIDING FOR CONFIDENTIALITY OF TEST RESULTS EXCEPT IN CERTAIN CIRCUMSTANCES; AND AMENDING SECTION 39-2-304, MCA."

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

NEW SECTION. **Section 1.** Short title. [Sections 1

through 5] may be cited as the "Private Workforce Drug Testing Act".

NEW SECTION. **Section 2.** Definitions. As used in

[sections 1 through 5], the following definitions apply:

(1) (a) "Controlled substance" means a dangerous drug as defined in 50-32-101 and as listed or to be listed in the schedule in 50-32-222 or 50-32-224.

(b) Controlled substance does not mean a dangerous drug used pursuant to a valid prescription or as authorized by law.

(2) "Employee" means an individual engaged in the performance of work for a private employer but does not

include an individual having the status of an independent contractor.

(3) "Employer" means a person or entity in the private sector that has one or more employees and is located or doing business in the state.

(4) "Medical review officer" means a licensed physician who contracts with an employer to receive laboratory results generated by an employer's drug testing program, who has knowledge of substance abuse disorders, and who has appropriate medical training to interpret and evaluate an employee's positive test results, together with the employee's medical history and any other relevant biomedical information.

(5) "Prospective employee" means an individual who has made application to an employer, whether written or oral, to become an employee.

(6) "Qualified testing program" means a program to test for the presence of controlled substances that meets the criteria set forth in [sections 4 and 5].

(7) "Sample" means a urine specimen.

NEW SECTION. **Section 3.** Limitation on employer

liability. Notwithstanding any other provision of law, a cause of action for monetary damages may not arise in favor of any person with respect to:

(1) a qualified testing program adopted and implemented



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1 by an employer to test employees for the presence of  
2 controlled substances unless the cause of action is based on  
3 one or more of the following allegations:

4 (a) the employer took disciplinary action based on a  
5 false test result, and the employer's reliance on the test  
6 result was not reasonable or was in bad faith. There is a  
7 rebuttable presumption that an employer's reliance on a test  
8 result was reasonable if the employer complied with the  
9 provisions of [sections 4 and 5].

10 (b) the employer committed defamation of character,  
11 libel, slander, or damage to reputation, as established by  
12 statute or common law, by knowingly disclosing false test  
13 results with malice.

14 (2) the failure of an employer's testing program to  
15 detect a specific controlled or other substance, a disease,  
16 an infectious agent, a virus, or a physical abnormality,  
17 problem, or defect of any kind.

18 NEW SECTION. **Section 4. Qualified testing program.** A  
19 qualified testing program must meet and be conducted  
20 according to the following criteria:

21 (1) Testing must be conducted according to the terms of  
22 written policies and procedures that must be adopted by the  
23 employer and be available for review by all employees and  
24 prospective employees 60 days prior to implementation. The  
25 policies and procedures must set forth, at a minimum:

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

5 (b) the employer's proposal for educating or providing  
6 information to employees on the health risks associated with  
7 the use of controlled substances;

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

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

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

18 (f) a statement that employees may be tested, including  
19 a discussion of the circumstances that may trigger an  
20 immediate test;

21 (g) a list of the controlled substances for which the  
22 employer intends to test;

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

25 (i) a detailed description of the procedures that will

1 be followed to conduct the testing program, including the  
2 resolution of a dispute concerning test results;

3 (j) a provision that all information, interviews,  
4 reports, statements, memoranda, and test results are  
5 confidential communications that will not be disclosed to  
6 anyone except:

7 (i) the tested employee;

8 (ii) employees or agents of the employer who are  
9 specifically authorized by the tested employee to receive  
10 the employee's test results; or

11 (iii) in a proceeding related to a legal action arising  
12 out of the employer's implementation of [sections 1 through  
13 5] or inquiries relating to a workplace accident involving  
14 death, physical injury, or property damage in excess of  
15 \$5,000 when there is reason to believe that the tested  
16 employee may have caused or contributed to the accident; and

17 (k) a provision that information obtained through drug  
18 testing that is unrelated to drug use must be held in strict  
19 confidentiality by the medical review officer and may not be  
20 released to the employer.

21 (2) In addition to imposing appropriate sanctions on  
22 employees for violations of the employer's standards of  
23 conduct referred to in subsection (1)(c), the employer may  
24 require an affected employee to participate in an  
25 appropriate drug rehabilitation program as a condition of

1 continued employment. The employer may subject the employee  
2 to periodic retesting as a condition of the rehabilitation  
3 program.

4 (3) Testing must be at the employer's expense, and all  
5 employees must be compensated at their regular rate,  
6 including benefits, for time attributable to the testing  
7 program.

8 (4) Sample collection must be performed in a manner  
9 designed to protect the privacy of the employee, using when  
10 practicable screens or stalls, except that in cases in which  
11 an employer has reason to believe an employee may adulterate  
12 or substitute the required sample, the employer may require  
13 that the sample be provided under the direct supervision of  
14 testing personnel of the same sex as the employee being  
15 tested.

16 (5) Samples must be handled under strict forensic  
17 chain-of-custody procedures. These procedures should require  
18 that the sample be collected, stored, and transported in a  
19 manner that will document and preserve the identity of each  
20 sample and prevent the adulteration, contamination, or  
21 erroneous identification of test results.

22 (6) Sample testing must be performed according to  
23 scientifically accepted analytical procedures by a qualified  
24 laboratory certified by the national institute on drug  
25 abuse. Confirmatory tests of the initial screening tests

1 must be conducted by the same laboratory using the gas  
2 chromatography-mass spectrometry techniques or techniques  
3 that are of comparable or superior quality with respect to  
4 validation.

5 (7) Before taking any action based on a positive test  
6 result, the results must be reviewed and certified by a  
7 medical review officer. An employee or prospective employee  
8 must be afforded the opportunity to provide notification to  
9 the medical review officer of any medical information that  
10 is relevant to interpreting test results, including  
11 currently or recently used prescription or nonprescription  
12 drugs.

13 NEW SECTION. **Section 5.** Confidentiality of results.

14 (1) Except as provided in subsection (2), all information,  
15 interviews, reports, statements, memoranda, or test results  
16 received by the employer through a qualified drug testing  
17 program are confidential communications and may not be used  
18 or received in evidence, obtained in discovery, or disclosed  
19 in any public or private proceeding.

20 (2) The material treated as confidential in subsection  
21 (1) may be used in a proceeding related to:

22 (a) legal action arising out of the employer's  
23 implementation of [sections 1 through 5]; or

24 (b) inquiries relating to a workplace accident  
25 involving death, physical injury, or property damage in

1 excess of \$5,000 when there is reason to believe that the  
2 tested employee may have caused or contributed to the  
3 accident.

4 **Section 6.** Section 39-2-304, MCA, is amended to read:

5 "39-2-304. Lie detector tests prohibited ---regulation  
6 of--blood--and--urine--testing. (1) No A person, firm,  
7 corporation, or other business entity or representative  
8 thereof ~~shall~~ may not require:

9 (a) as a condition for employment or continuation of  
10 employment; any person to take a polygraph test or any form  
11 of a mechanical lie detector test;.

12 (b) ~~as a condition for employment; any person to submit~~  
13 ~~to a blood or urine test; except for employment in hazardous~~  
14 ~~work environments or in jobs the primary responsibility of~~  
15 ~~which is security, public safety, or fiduciary~~  
16 ~~responsibility; and~~

17 (c) ~~as a condition for continuation of employment; any~~  
18 ~~employee to submit to a blood or urine test unless the~~  
19 ~~employer has reason to believe that the employee's faculties~~  
20 ~~are impaired on the job as a result of alcohol consumption~~  
21 ~~or illegal drug use;~~

22 (2) ~~Prior to the administration of a drug or alcohol~~  
23 ~~test, the person, firm, corporation, or other business~~  
24 ~~entity or its representative shall adopt a written testing~~  
25 ~~procedure and make it available to all persons subject to~~

1 testing. A testing procedure must provide for the:

2 (a) collection of a blood or urine specimen in a manner

3 that minimizes invasion of personal privacy while ensuring

4 the integrity of the collection process;

5 (b) collection of a quantity of specimen sufficient to

6 ensure the administration of several tests;

7 (c) collection, storage, and transportation of the

8 specimen in tamper-proof containers;

9 (d) adoption of chain-of-custody documentation

10 procedures identifying how the specimen was handled and

11 tested;

12 (e) verification of test results by two or more

13 different testing procedures before judging a test positive;

14 and

15 (f) prohibition of the release of test results, except

16 as authorized by the person tested or as required by a court

17 of law.

18 (3) The person, firm, corporation, or other business

19 entity or its representative shall provide a copy of drug or

20 alcohol test results to the person tested and provide him

21 the opportunity, at the expense of the person requiring the

22 test, to obtain a confirmatory test of the blood or urine by

23 an independent laboratory selected by the person tested. The

24 person tested must be given the opportunity to rebut or

25 explain the results of either test or both tests.

1 (4) Adverse action may not be taken against a person

2 tested under subsections (1)(b), (1)(c), (2), and (3) if the

3 person tested presents a reasonable explanation or medical

4 opinion indicating that the results of the test were not

5 caused by alcohol consumption or illegal drug use.

6 (5) A person who violates this section is guilty of a

7 misdemeanor."

8 NEW SECTION. **Section 7. Severability.** If a part of

9 [this act] is invalid, all valid parts that are severable

10 from the invalid part remain in effect. If a part of [this

11 act] is invalid in one or more of its applications, the part

12 remains in effect in all valid applications that are

13 severable from the invalid applications.

-End-