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INTRODUCED BY Masolo House BILL NO. 345

A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE PRIVATE WORKFORCE DRUG AND ALCOHOL TESTING ACT; ESTABLISHING CRITERIA FOR DRUG AND ALCOHOL TESTING OF EMPLOYEES AND PROSPECTIVE EMPLOYEES; LIMITING THE LIABILITY OF EMPLOYERS USING QUALIFIED DRUG AND ALCOHOL 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 and Alcohol Testing Act".

NEW SECTION. Section 2. Definitions. As used in [sections 1 through 5], the following definitions apply:

(1) "Controlled substance" means a dangerous drug, as defined as 50-32-101, and listed in Schedules I or II in 50-32-222 and 50-32-224, except a 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 and does not include an independent contractor.

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

(4) "Medical review officer" means a state-licensed physician trained in the field of substance abuse.

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

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

(7) "Sample" means a urine or blood specimen to determine the presence of a controlled substance

1 or a breath alcohol test to determine the presence of alcohol.

2

3 **NEW SECTION. Section 3. Limitations on employer liability.** (1) An employer is not liable for
4 monetary damages arising out of a drug or alcohol test that the employer requires an employee or
5 prospective employee to take if the test is administered pursuant to a qualified testing program that is
6 adopted and implemented by an employer to test employees for the presence of controlled substances or
7 alcohol, unless:

8 (a) the employer took disciplinary action against the employee based on a false test result and the
9 employer’s reliance on the test result was not reasonable or was in bad faith. There is a rebuttable
10 presumption that an employer’s reliance on a test result is reasonable if the employer complies with the
11 provisions of [sections 4 and 5] and rules adopted pursuant to [sections 4 and 5].

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

14 (2) An employer is not liable for monetary damages arising out of a drug or alcohol test that fails
15 to detect a specific controlled substance or other substance, disease, infectious agent, virus, or physical
16 abnormality, problem, or defect of any kind.

17

18 **NEW SECTION. Section 4. Qualified testing program.** A qualified testing program must comply
19 with the following criteria:

20 (1) Testing must be conducted according to the terms of written policies and procedures that must
21 be adopted by the employer and must be available for review by all employees and prospective employees
22 60 days before implementation. At a minimum, the policies and procedures must require:

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

25 (b) the employer’s proposal for educating or providing information to employees on the health risks
26 associated with the use of controlled substances and alcohol;

27 (c) the employer’s standards of conduct that regulate the use of controlled substances and alcohol
28 by employees;

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

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

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

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

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

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

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

13 (i) the tested employee;

14 (ii) employees or agents of the employer who are specifically authorized by the tested employee
15 to resolve the employee's test results; or

16 (iii) in a proceeding related to a legal action arising out of the employer's implementation of
17 [sections 1 through 5] or in response to inquiries relating to a workplace accident involving death, physical
18 injury, or property damage in excess of \$1,500, when there is reason to believe that the tested employee
19 may have caused or contributed to the accident; and

20 (k) a provision that information obtained through testing that is unrelated to the use of a controlled
21 substance or alcohol must be held in strict confidentiality by the medical review officer and may not be
22 released to the employer.

23 (2) In addition to imposing appropriate sanctions on an employee for violation of the employer's
24 standards of conduct, an employer may require an employee who tests positive on a test for controlled
25 substances or alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation
26 program as a condition of continued employment. An employer may require the employee to submit to
27 periodic retesting as a condition of the counseling, treatment, or rehabilitation program.

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

30 (4) The collection of samples must be performed in a manner designed to protect the privacy of

1 the employee, using, when practicable, screens or stalls, except that if an employer has reason to believe
 2 an employee may adulterate or substitute the required sample, the employer may require that the sample
 3 be provided under the direct supervision of testing personnel.

4 (5) Samples must be handled under strict forensic chain-of-custody procedures. The procedures
 5 must require that a sample be collected, stored, and transported in a manner that documents and preserves
 6 the identity of each sample and prevents the adulteration, contamination, or erroneous identification of test
 7 results.

8 (6) Testing of samples must be performed according to scientifically accepted analytical procedures
 9 by a qualified laboratory certified by the national institute on drug abuse. Confirmatory tests of an initial
 10 screening test must be conducted by the same laboratory using gas chromatography-mass spectrometry
 11 techniques or techniques that are of comparable or superior quality with respect to validation.

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

17

18 **NEW SECTION. Section 5. Confidentiality of results.** (1) Except as provided in subsection (2) and
 19 except for information that is required by law to be reported to a state or federal licensing authority, all
 20 information, interviews, reports, statements, memoranda, or test results received by an employer through
 21 a qualified testing program are confidential communications and may not be used or received in evidence,
 22 obtained in discovery, or disclosed in any public or private proceeding.

23 (2) Material that is confidential under subsection (1) may be used in a proceeding related to:

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

25 (b) inquiries relating to a workplace accident involving death, physical injury, or property damage
 26 in excess of \$1,500 when there is reason to believe that the tested employee may have caused or
 27 contributed to the accident.

28

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

30 **"39-2-304. Lie detector tests prohibited —~~regulation of blood and urine testing.~~** (1) A person, firm,

1 corporation, or other business entity or its representative may not require:

2 ~~(a) as a condition for employment or continuation of employment, a person to take a polygraph test~~
 3 ~~or any form of a mechanical lie detector test; as a condition for employment or continuation of employment.~~

4 ~~(b) as a condition for employment, a person to submit to a blood or urine test, except for~~
 5 ~~employment in:~~

6 ~~(i) hazardous work environments;~~

7 ~~(ii) jobs the primary responsibility of which is security, public safety, or fiduciary responsibility; or~~

8 ~~(iii) jobs involving the intrastate commercial transportation of persons or commodities by a~~
 9 ~~commercial motor carrier or an employee subject to driver qualification requirements; and~~

10 ~~(c) as a condition for continuation of employment, an employee to submit to a blood or urine test,~~
 11 ~~except when:~~

12 ~~(i) the employer has reason to believe that the employee's faculties are impaired on the job as a~~
 13 ~~result of alcohol consumption or illegal drug use;~~

14 ~~(ii) the employer has reason to believe that an employee may have contributed to a work-related~~
 15 ~~accident that causes death or personal injury or property damage in excess of \$1,500; or~~

16 ~~(iii) drug testing is being conducted at an employee's regular biennial physical for employment in~~
 17 ~~jobs involving the intrastate commercial motor carrier transportation of persons or commodities.~~

18 ~~(2) Prior to the administration of a drug or alcohol test, the person, firm, corporation, or other~~
 19 ~~business entity or its representative shall adopt the written testing procedure that is provided in 49 CFR,~~
 20 ~~part 40, and make it available to all persons subject to testing.~~

21 ~~(3) The person, firm, corporation, or other business entity or its representative shall provide a copy~~
 22 ~~of drug or alcohol test results to the person tested and provide the person with the opportunity, at the~~
 23 ~~expense of the person requiring the test, to obtain a confirmatory test of the blood or urine by an~~
 24 ~~independent laboratory selected by the person tested. The person tested must be given the opportunity to~~
 25 ~~rebut or explain the results of either test or both tests. In the case of an accident referred to in subsection~~
 26 ~~(1)(c)(iii), the tests may not be delayed, but the person, firm, corporation, or other business entity or its~~
 27 ~~representative shall, as soon as possible, make a written finding as to whether the act or failure to act is~~
 28 ~~believed to be a direct or proximate cause of the accident and shall provide the tested employee with a~~
 29 ~~copy of the finding. The written record of a blood or urine test of an employee who is required to submit~~
 30 ~~to testing pursuant to subsection (1)(c)(iii) and whose acts or failure to act is subsequently found not to be~~

1 ~~the direct or proximate cause of a work-related accident must be removed from the employee's work record~~
2 ~~and be destroyed.~~

3 ~~(4) Adverse action may not be taken against a person tested under subsections (1)(b), (1)(c), (2),~~
4 ~~and (3) if the person tested presents a reasonable explanation or medical opinion indicating that the results~~
5 ~~of the test were not caused by alcohol consumption or illegal drug use.~~

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

7 ~~(6) As used in this section:~~

8 ~~(a) "commercial motor carrier" has the meaning provided in 61-1-320 and in 69-12-101; and~~

9 ~~(b) "intrastate" means commerce or trade that is begun, carried on, and completed wholly in this~~
10 ~~state."~~

11

12 NEW SECTION. **Section 7. Codification instruction.** [Sections 1 through 5] are intended to be
13 codified as an integral part of Title 39, chapter 2, part 2, and the provisions of Title 39, chapter 2, part 2,
14 apply to [sections 1 through 5].

15

-END-

1 HOUSE BILL NO. 345

2 INTRODUCED BY MASOLO

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE ~~PRIVATE~~ WORKFORCE DRUG AND ALCOHOL
5 TESTING ACT; ESTABLISHING CRITERIA FOR DRUG AND ALCOHOL TESTING OF EMPLOYEES AND
6 PROSPECTIVE EMPLOYEES; LIMITING THE LIABILITY OF EMPLOYERS USING QUALIFIED DRUG AND
7 ALCOHOL TESTING PROGRAMS; PROVIDING FOR CONFIDENTIALITY OF TEST RESULTS EXCEPT IN
8 CERTAIN CIRCUMSTANCES; AND AMENDING SECTION 39-2-304, MCA."

9
10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11
12 NEW SECTION. **Section 1. Short title.** [Sections 1 through ~~5~~ 8] may be cited as the "~~Private~~
13 ~~Workforce~~ "WORKFORCE Drug and Alcohol Testing Act".

14
15 NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through ~~5~~ 8], the following
16 definitions apply: (1) "ALCOHOL" MEANS AN INTOXICATING AGENT IN ALCOHOLIC BEVERAGES, ETHYL
17 ALCOHOL, ALSO CALLED ETHANOL, OR THE HYDRATED OXIDE OF ETHYL.

18 (2) "ALCOHOL CONCENTRATION" MEANS THE ALCOHOL IN A VOLUME OF BREATH EXPRESSED
19 IN TERMS OF GRAMS OF ALCOHOL PER 210 LITERS OF BREATH, AS INDICATED BY AN EVIDENTIAL
20 BREATH TEST.

21 (1)(3) "Controlled substance" means a dangerous drug, as defined as ~~50-32-101~~, and listed in
22 ~~Schedules I or II in 50-32-222 and 50-32-224~~ IN 49 CFR, PART 40, except a drug used pursuant to a valid
23 prescription or as authorized by law.

24 (2)(4) "Employee" means an individual engaged in the performance of work for a ~~private~~ AN
25 employer and does not include an independent contractor.

26 (3)(5) "Employer" means a person or entity ~~in the private sector~~ that has one or more employees
27 and that is located in or doing business in Montana.

28 (4)(6) "Medical review officer" means a ~~state licensed~~ LICENSED physician trained in the field of
29 substance abuse.

30 (5)(7) "Prospective employee" means an individual who has made a written or oral application to

1 an employer to become an employee.

2 ~~(6)(8)~~ "Qualified testing program" means a program to test for the presence of controlled
3 substances and alcohol that meets the criteria set forth in [sections 4 and 5].

4 ~~(7)(9)~~ "Sample" means a urine ~~or blood~~ specimen to determine the presence of a controlled
5 substance or a breath alcohol test to determine the presence of alcohol.

6
7 **NEW SECTION. Section 3. Limitations on employer liability.** (1) An employer is not liable for
8 monetary damages arising out of a drug or alcohol test that the employer requires an employee or
9 prospective employee to take if the test is administered pursuant to a qualified testing program that is
10 adopted and implemented by an employer to test employees for the presence of controlled substances or
11 alcohol, unless:

12 (a) the employer took disciplinary action against the employee based on a false test result and the
13 employer's reliance on the test result was not reasonable or was in bad faith. There is a rebuttable
14 presumption that an employer's reliance on a test result is reasonable if the employer complies with the
15 provisions of [sections 4 ~~and 5~~ THROUGH 8] and rules adopted pursuant to [sections 4 ~~and 5~~ THROUGH
16 8].

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

19 (2) An employer is not liable for monetary damages arising out of a drug or alcohol test that fails
20 to detect a specific controlled substance or other substance, disease, infectious agent, virus, or physical
21 abnormality, problem, or defect of any kind.

22

23 **NEW SECTION. Section 4. Qualified testing program.** A qualified testing program must comply
24 with the following criteria:

25 (1) Testing must be conducted according to the terms of written policies and procedures that must
26 be adopted by the employer and must be available for review by all employees and prospective employees
27 60 days before ~~implementation.~~ THE TERMS ARE IMPLEMENTED OR CHANGED. CONTROLLED
28 SUBSTANCE AND ALCOHOL TESTING PROCEDURES MUST CONFORM TO 49 CFR, PART 40. At a
29 minimum, the policies and procedures must require:

30 (a) a description of the applicable legal sanctions under federal, state, and local law for the unlawful

1 manufacture, distribution, possession, or use of a controlled substance;

2 (b) the employer's proposal for educating or providing information to employees on the health risks
3 associated with the use of controlled substances and alcohol;

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

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

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

11 (f) a statement that employees may be tested, including a ~~discussion~~ DESCRIPTION of the
12 circumstances that may trigger an immediate test;

13 (g) a list of controlled substances for which the employer intends to test AND A STATED
14 ALCOHOL CONCENTRATION LEVEL ABOVE WHICH A TESTED EMPLOYEE MUST BE SANCTIONED;

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

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

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

21 (i) the tested employee;

22 (ii) employees or agents of the employer who are specifically authorized by the tested employee
23 to ~~resolve~~ RECEIVE the employee's test results; or

24 (iii) ~~in a proceeding related to a legal action~~ IN CONNECTION WITH ANY LEGAL OR
25 ADMINISTRATIVE CLAIM arising out of the employer's implementation of [sections 1 through ~~5~~ 8] or in
26 response to inquiries relating to a workplace accident involving death, physical injury, or property damage
27 in excess of \$1,500, when there is reason to believe that the tested employee may have caused or
28 contributed to the accident; and

29 (k) a provision that information obtained through testing that is unrelated to the use of a controlled
30 substance or alcohol must be held in strict confidentiality by the medical review officer and may not be

1 released to the employer.

2 (2) In addition to imposing appropriate sanctions on an employee for violation of the employer's
3 standards of conduct, an employer may require an employee who tests positive on a test for controlled
4 substances or alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation
5 program as a condition of continued employment. An employer may require the employee to submit to
6 periodic ~~retesting~~ FOLLOWUP TESTING as a condition of the counseling, treatment, or rehabilitation
7 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 ~~of~~ TRANSPORT, AND TESTING OF URINE samples must be performed in a
11 manner ~~designed to protect the privacy of the employee, using, when practicable, screens or stalls, except~~
12 ~~that if an employer has reason to believe an employee may adulterate or substitute the required sample,~~
13 ~~the employer may require that the sample be provided under the direct supervision of testing personnel.~~

14 ~~(5) Samples must be handled under strict forensic chain of custody procedures. The procedures~~
15 ~~must require that a sample be collected, stored, and transported in a manner that documents and preserves~~
16 ~~the identity of each sample and prevents the adulteration, contamination, or erroneous identification of test~~
17 ~~results.~~

18 ~~(6) Testing of samples must be performed according to scientifically accepted analytical procedures~~
19 ~~by a qualified laboratory certified by the national institute on drug abuse. Confirmatory tests of an initial~~
20 ~~screening test must be conducted by the same laboratory using gas chromatography mass spectrometry~~
21 ~~techniques or techniques that are of comparable or superior quality with respect to validation~~
22 ACCORDANCE WITH 49 CFR, PART 40.

23 ~~(7)(5)~~ Before an employer may take any action based on a positive test result, the employer shall
24 have the results reviewed and certified by a medical review officer who is trained in the field of substance
25 abuse. An employee or prospective employee must be given the opportunity to provide notification to the
26 medical review officer of any medical information that is relevant to interpreting test results, including
27 information concerning currently or recently used prescription or nonprescription drugs.

28 (6) BREATH ALCOHOL TESTS MUST BE ADMINISTERED BY A CERTIFIED BREATH ALCOHOL
29 TECHNICIAN AND MAY ONLY BE CONDUCTED USING TESTING EQUIPMENT THAT APPEARS ON THE
30 LIST OF CONFORMING PRODUCTS PUBLISHED IN THE FEDERAL REGISTER.

1 (7) A BREATH ALCOHOL TEST RESULT MUST INDICATE AN ALCOHOL CONCENTRATION OF
2 GREATER THAN 0.04 FOR A PERSON TO BE CONSIDERED AS HAVING ALCOHOL IN THE PERSON'S
3 BODY.

4
5 NEW SECTION. SECTION 5. QUALIFIED TESTING PROGRAM -- ALLOWABLE TYPES --
6 PROCEDURES. EACH OF THE FOLLOWING ACTIVITIES IS PERMISSIBLE IN THE IMPLEMENTATION OF A
7 QUALIFIED TESTING PROGRAM:

8 (1) AN EMPLOYER MAY TEST ANY NEWLY HIRED EMPLOYEE WITHIN 5 DAYS OF THE
9 EMPLOYEE'S REPORTING TO WORK.

10 (2) AN EMPLOYER MAY USE RANDOM TESTING IF THE EMPLOYER'S CONTROLLED SUBSTANCE
11 AND ALCOHOL POLICY INCLUDES ONE OR BOTH OF THE FOLLOWING PROCEDURES:

12 (A) AN EMPLOYER OR AN EMPLOYER'S REPRESENTATIVE MAY ESTABLISH A DATE WHEN ALL
13 SALARIED AND WAGE-EARNING EMPLOYEES WILL BE REQUIRED TO UNDERGO CONTROLLED
14 SUBSTANCE OR ALCOHOL TESTS, OR BOTH.

15 (B) AN EMPLOYER MAY MANAGE OR CONTRACT WITH A THIRD PARTY TO ESTABLISH AND
16 ADMINISTER A RANDOM TESTING PROCESS THAT MUST INCLUDE:

17 (I) AN ESTABLISHED CALENDAR PERIOD FOR TESTING;

18 (II) AN ESTABLISHED TESTING RATE WITHIN THE CALENDAR PERIOD;

19 (III) A RANDOM SELECTION PROCESS THAT WILL DETERMINE WHO WILL BE TESTED ON ANY
20 GIVEN DATE DURING THE CALENDAR PERIOD FOR TESTING;

21 (IV) ALL SUPERVISORY AND MANAGERIAL EMPLOYEES IN THE RANDOM SELECTION PROCESS;

22 AND

23 (V) A PROCEDURE THAT REQUIRES THE EMPLOYER TO OBTAIN A SIGNED STATEMENT FROM
24 EACH EMPLOYEE THAT CONFIRMS THAT THE EMPLOYEE HAS RECEIVED A WRITTEN DESCRIPTION OF
25 THE RANDOM SELECTION PROCESS AND THAT REQUIRES THE EMPLOYER TO MAINTAIN THE
26 STATEMENT IN THE EMPLOYEE'S PERSONNEL FILE. THE SELECTION OF EMPLOYEES IN A RANDOM
27 TESTING PROCEDURE MUST BE MADE BY A SCIENTIFICALLY VALID METHOD, SUCH AS A RANDOM
28 NUMBER TABLE OR A COMPUTER-BASED RANDOM NUMBER GENERATOR TABLE.

29 (3) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO SUBMIT TO FOLLOWUP TESTS IF THE
30 EMPLOYER DETERMINES THAT THE EMPLOYEE HAS MISUSED CONTROLLED SUBSTANCES OR

1 ALCOHOL AT THE WORK SITE. THE FOLLOWUP TESTS MUST BE DESCRIBED IN THE EMPLOYER'S
2 CONTROLLED SUBSTANCE AND ALCOHOL POLICY AND MAY BE CONDUCTED FOR UP TO 1 YEAR FROM
3 THE TIME THAT THE EMPLOYER FIRST REQUIRES A FOLLOWUP TEST.

4 (4) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO BE TESTED FOR CONTROLLED
5 SUBSTANCES OR ALCOHOL IF THE EMPLOYER HAS REASON TO SUSPECT THAT AN EMPLOYEE'S
6 FACULTIES ARE IMPAIRED ON THE JOB AS A RESULT OF THE USE OF A CONTROLLED SUBSTANCE OR
7 ALCOHOL CONSUMPTION. AN EMPLOYER SHALL COMPLY WITH THE SUPERVISORY TRAINING
8 REQUIREMENT IN 49 CFR, PART 382.603, WHENEVER THE EMPLOYER REQUIRES A TEST ON THE BASIS
9 OF REASONABLE SUSPICION.

10 (5) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO BE TESTED FOR CONTROLLED
11 SUBSTANCES OR ALCOHOL IF THE EMPLOYER HAS REASON TO BELIEVE THAT THE EMPLOYEE MAY
12 HAVE CONTRIBUTED TO A WORK-RELATED ACCIDENT THAT HAS CAUSED DEATH OR PERSONAL
13 INJURY OR PROPERTY DAMAGE IN EXCESS OF \$1,500.

14
15 NEW SECTION. SECTION 6. EMPLOYEE'S RIGHT OF REBUTTAL. THE EMPLOYER SHALL PROVIDE
16 AN EMPLOYEE WHO HAS BEEN TESTED UNDER ANY QUALIFIED TESTING PROGRAM DESCRIBED IN
17 [SECTION 5] WITH A COPY OF THE TEST REPORT. THE EMPLOYER IS ALSO REQUIRED TO OBTAIN, AT
18 THE EMPLOYEE'S REQUEST AND AT THE EMPLOYEE'S EXPENSE, AN ADDITIONAL TEST OF THE URINE
19 SPLIT SAMPLE BY AN INDEPENDENT LABORATORY SELECTED BY THE PERSON TESTED. THE EMPLOYEE
20 MUST BE PROVIDED THE OPPORTUNITY TO REBUT OR EXPLAIN THE RESULTS OF ANY TEST.

21
22 NEW SECTION. SECTION 7. LIMITATION ON ADVERSE ACTION. ADVERSE ACTION MAY NOT
23 BE TAKEN BY THE EMPLOYER IF THE EMPLOYEE PRESENTS A REASONABLE EXPLANATION OR MEDICAL
24 OPINION INDICATING THAT THE ORIGINAL TEST RESULTS WERE NOT CAUSED BY ILLEGAL USE OF
25 CONTROLLED SUBSTANCES OR BY ALCOHOL CONSUMPTION. IF THE EMPLOYEE PRESENTS A
26 REASONABLE EXPLANATION OR MEDICAL OPINION, THE TEST RESULTS MUST BE REMOVED FROM THE
27 EMPLOYEE'S RECORD AND DESTROYED.

28
29 NEW SECTION. Section 8. Confidentiality of results. (1) Except as provided in subsection (2) and
30 except for information that is required by law to be reported to a state or federal licensing authority, all

1 information, interviews, reports, statements, memoranda, or test results received by an employer through
 2 a qualified testing program are confidential communications and may not be used or received in evidence,
 3 obtained in discovery, or disclosed in any public or private proceeding.

4 (2) Material that is confidential under subsection (1) may be used in a proceeding related to:

5 (a) legal action arising out of an employer's implementation of [sections 1 through 5 8]; or

6 (b) inquiries relating to a workplace accident involving death, physical injury, or property damage
 7 in excess of \$1,500 when there is reason to believe that the tested employee may have caused or
 8 contributed to the accident.

9

10 **Section 9.** Section 39-2-304, MCA, is amended to read:

11 **"39-2-304. Lie detector tests prohibited —~~regulation of blood and urine testing.~~** (1) A person, firm,
 12 corporation, or other business entity or its representative may not require:

13 ~~(a) as a condition for employment or continuation of employment,~~ a person to take a polygraph test
 14 or any form of a mechanical lie detector test; as a condition for employment or continuation of employment,

15 ~~(b) as a condition for employment, a person to submit to a blood or urine test, except for~~
 16 employment in:

17 ~~(i) hazardous work environments;~~

18 ~~(ii) jobs the primary responsibility of which is security, public safety, or fiduciary responsibility; or~~

19 ~~(iii) jobs involving the intrastate commercial transportation of persons or commodities by a~~
 20 commercial motor carrier or an employee subject to driver qualification requirements; and

21 ~~(c) as a condition for continuation of employment, an employee to submit to a blood or urine test,~~
 22 except when:

23 ~~(i) the employer has reason to believe that the employee's faculties are impaired on the job as a~~
 24 ~~result of alcohol consumption or illegal drug use;~~

25 ~~(ii) the employer has reason to believe that an employee may have contributed to a work-related~~
 26 ~~accident that causes death or personal injury or property damage in excess of \$1,500; or~~

27 ~~(iii) drug testing is being conducted at an employee's regular biennial physical for employment in~~
 28 ~~jobs involving the intrastate commercial motor carrier transportation of persons or commodities.~~

29 ~~(2) Prior to the administration of a drug or alcohol test, the person, firm, corporation, or other~~
 30 ~~business entity or its representative shall adopt the written testing procedure that is provided in 49 CFR,~~

1 part 40, and make it available to all persons subject to testing.

2 ~~(3) The person, firm, corporation, or other business entity or its representative shall provide a copy~~
 3 ~~of drug or alcohol test results to the person tested and provide the person with the opportunity, at the~~
 4 ~~expense of the person requiring the test, to obtain a confirmatory test of the blood or urine by an~~
 5 ~~independent laboratory selected by the person tested. The person tested must be given the opportunity to~~
 6 ~~rebut or explain the results of either test or both tests. In the case of an accident referred to in subsection~~
 7 ~~(1)(c)(iii), the tests may not be delayed, but the person, firm, corporation, or other business entity or its~~
 8 ~~representative shall, as soon as possible, make a written finding as to whether the act or failure to act is~~
 9 ~~believed to be a direct or proximate cause of the accident and shall provide the tested employee with a~~
 10 ~~copy of the finding. The written record of a blood or urine test of an employee who is required to submit~~
 11 ~~to testing pursuant to subsection (1)(c)(iii) and whose act or failure to act is subsequently found not to be~~
 12 ~~the direct or proximate cause of a work-related accident must be removed from the employee's work record~~
 13 ~~and be destroyed.~~

14 ~~(4) Adverse action may not be taken against a person tested under subsections (1)(b), (1)(c), (2),~~
 15 ~~and (3) if the person tested presents a reasonable explanation or medical opinion indicating that the results~~
 16 ~~of the test were not caused by alcohol consumption or illegal drug use.~~

17 ~~(5) A person who violates this section is guilty of a misdemeanor.~~

18 ~~(6) As used in this section:~~

19 ~~(a) "commercial motor carrier" has the meaning provided in 61-1-320 and in 69-12-101; and~~

20 ~~(b) "intrastate" means commerce or trade that is begun, carried on, and completed wholly in this~~
 21 ~~state."~~

22

23 **NEW SECTION. Section 10. Codification instruction.** [Sections 1 through 5 8] are intended to be
 24 codified as an integral part of Title 39, chapter 2, part 2, and the provisions of Title 39, chapter 2, part 2,
 25 apply to [sections 1 through 5 8].

26

27 **NEW SECTION. SECTION 11. SEVERABILITY.** IF A PART OF [THIS ACT] IS INVALID, ALL VALID
 28 PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT]
 29 IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID
 30 APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

-END-

1 HOUSE BILL NO. 345

2 INTRODUCED BY MASOLO

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE PRIVATE WORKFORCE DRUG AND ALCOHOL
5 TESTING ACT; ESTABLISHING CRITERIA FOR DRUG AND ALCOHOL TESTING OF EMPLOYEES AND
6 PROSPECTIVE EMPLOYEES; ~~LIMITING THE LIABILITY OF EMPLOYERS USING QUALIFIED DRUG AND~~
7 ~~ALCOHOL TESTING PROGRAMS~~; PROVIDING FOR CONFIDENTIALITY OF TEST RESULTS EXCEPT IN
8 CERTAIN CIRCUMSTANCES; AND AMENDING SECTION 39-2-304, MCA."

9
10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11
12 NEW SECTION. Section 1. Short title. [Sections 1 through ~~5-8~~ 7] may be cited as the "~~Private~~
13 ~~Workforce~~ "WORKFORCE Drug and Alcohol Testing Act".

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15 NEW SECTION. Section 2. Definitions. As used in [sections 1 through ~~5-8~~ 7], the following
16 definitions apply: (1) "ALCOHOL" MEANS AN INTOXICATING AGENT IN ALCOHOLIC BEVERAGES, ETHYL
17 ALCOHOL, ALSO CALLED ETHANOL, OR THE HYDRATED OXIDE OF ETHYL.

18 (2) "ALCOHOL CONCENTRATION" MEANS THE ALCOHOL IN A VOLUME OF BREATH EXPRESSED
19 IN TERMS OF GRAMS OF ALCOHOL PER 210 LITERS OF BREATH, AS INDICATED BY AN EVIDENTIAL
20 BREATH TEST.

21 ~~(1)(3)~~ "Controlled substance" means a dangerous drug, as defined ~~as 50-32-101~~, and listed in
22 ~~Schedules I or II in 50-32-222 and 50-32-224~~ IN 49 CFR, PART 40, except a drug used pursuant to a valid
23 prescription or as authorized by law.

24 ~~(2)(4)~~ "Employee" means an individual engaged in the performance of work IN A HAZARDOUS
25 WORK ENVIRONMENT, SECURITY POSITION, POSITION AFFECTING PUBLIC SAFETY, OR FIDUCIARY
26 POSITION for a ~~private~~ AN employer and does not include an independent contractor. THE TERM INCLUDES
27 AN ELECTED OFFICIAL.

28 ~~(3)(5)~~ "Employer" means a person or entity ~~in the private sector~~ that has one or more employees
29 and that is located in or doing business in Montana.

30 (6) "HAZARDOUS WORK ENVIRONMENT" INCLUDES BUT IS NOT LIMITED TO POSITIONS:

1 (A) FOR WHICH DRUG AND ALCOHOL TESTING IS MANDATED BY FEDERAL LAW, SUCH AS
 2 AVIATION, INTERSTATE MOTOR CARRIER, RAILROAD, PIPELINE, AND COMMERCIAL MARINE
 3 EMPLOYEES;

4 (B) THAT INVOLVE THE OPERATION OF OR WORK IN PROXIMITY TO CONSTRUCTION
 5 EQUIPMENT, INDUSTRIAL MACHINERY, OR MINING ACTIVITIES; OR

6 (C) THAT INVOLVE HANDLING OR PROXIMITY TO FLAMMABLE MATERIALS, EXPLOSIVES,
 7 TOXIC CHEMICALS, OR SIMILAR SUBSTANCES.

8 ~~(4)(6)(7)~~ "Medical review officer" means a ~~state licensed~~ LICENSED physician trained in the field
 9 of substance abuse.

10 ~~(5)(7)(8)~~ "Prospective employee" means an individual who has made a written or oral application
 11 to an employer to become an employee.

12 ~~(6)(8)(9)~~ "Qualified testing program" means a program to test for the presence of controlled
 13 substances and alcohol that meets the criteria set forth in [sections 43 and 54].

14 ~~(7)(9)(10)~~ "Sample" means a urine ~~or blood~~ specimen to determine the presence of a controlled
 15 substance or a breath alcohol test to determine the presence of alcohol.

16
 17 ~~**NEW SECTION. Section 3. Limitations on employer liability.** (1) An employer is not liable for~~
 18 ~~monetary damages arising out of a drug or alcohol test that the employer requires an employee or~~
 19 ~~prospective employee to take if the test is administered pursuant to a qualified testing program that is~~
 20 ~~adopted and implemented by an employer to test employees for the presence of controlled substances or~~
 21 ~~alcohol, unless:~~

22 ~~(a) the employer took disciplinary action against the employee based on a false test result and the~~
 23 ~~employer's reliance on the test result was not reasonable or was in bad faith. There is a rebuttable~~
 24 ~~presumption that an employer's reliance on a test result is reasonable if the employer complies with the~~
 25 ~~provisions of [sections 4 and 5 THROUGH 8] and rules adopted pursuant to [sections 4 and 5 THROUGH~~
 26 ~~8].~~

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

29 ~~(2) An employer is not liable for monetary damages arising out of a drug or alcohol test that fails~~
 30 ~~to detect a specific controlled substance or other substance, disease, infectious agent, virus, or physical~~

1 ~~abnormality, problem, or defect of any kind.~~

2

3 NEW SECTION. Section 3. Qualified testing program. A qualified testing program must comply
4 with the following criteria:

5 (1) Testing must be conducted according to the terms of written policies and procedures that must
6 be adopted by the employer and must be available for review by all employees and prospective employees
7 60 days before ~~implementation.~~ THE TERMS ARE IMPLEMENTED OR CHANGED. CONTROLLED
8 SUBSTANCE AND ALCOHOL TESTING PROCEDURES MUST CONFORM TO 49 CFR, PART 40. At a
9 minimum, the policies and procedures must require:

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

12 (b) the employer's proposal for educating or providing information to employees on the health risks
13 associated with the use of controlled substances and alcohol;

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

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

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

21 (f) a statement that employees may be tested, including a ~~discussion~~ DESCRIPTION of the
22 circumstances that may trigger an immediate test;

23 (g) a list of controlled substances for which the employer intends to test AND A STATED
24 ALCOHOL CONCENTRATION LEVEL ABOVE WHICH A TESTED EMPLOYEE MUST BE SANCTIONED;

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

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

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

1 (i) the tested employee;

2 (ii) employees or agents of the employer who are specifically authorized by the tested employee
3 to ~~resolve~~ RECEIVE the employee's test results; or

4 (iii) ~~in a proceeding related to a legal action~~ IN CONNECTION WITH ANY LEGAL OR
5 ADMINISTRATIVE CLAIM arising out of the employer's implementation of [sections 1 through ~~5-87~~] or in
6 response to inquiries relating to a workplace accident involving death, physical injury, or property damage
7 in excess of \$1,500, when there is reason to believe that the tested employee may have caused or
8 contributed to the accident; and

9 (k) a provision that information obtained through testing that is unrelated to the use of a controlled
10 substance or alcohol must be held in strict confidentiality by the medical review officer and may not be
11 released to the employer.

12 (2) In addition to imposing appropriate sanctions on an employee for violation of the employer's
13 standards of conduct, an employer may require an employee who tests positive on a test for controlled
14 substances or alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation
15 program as a condition of continued employment. An employer may require the employee to submit to
16 periodic ~~retesting~~ FOLLOWUP TESTING as a condition of the counseling, treatment, or rehabilitation
17 program.

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

20 (4) The collection ~~of~~ TRANSPORT, AND TESTING OF URINE samples must be performed ~~IN~~ ~~in a~~
21 ~~manner designed to protect the privacy of the employee, using, when practicable, screens or stalls, except~~
22 ~~that if an employer has reason to believe an employee may adulterate or substitute the required sample,~~
23 ~~the employer may require that the sample be provided under the direct supervision of testing personnel.~~

24 (5) ~~Samples must be handled under strict forensic chain of custody procedures. The procedures~~
25 ~~must require that a sample be collected, stored, and transported in a manner that documents and preserves~~
26 ~~the identity of each sample and prevents the adulteration, contamination, or erroneous identification of test~~
27 ~~results.~~

28 (6) ~~Testing of samples must be performed according to scientifically accepted analytical procedures~~
29 ~~by a qualified laboratory certified by the national institute on drug abuse. Confirmatory tests of an initial~~
30 ~~screening test must be conducted by the same laboratory using gas chromatography mass spectrometry~~

1 ~~techniques or techniques that are of comparable or superior quality with respect to validation~~
2 ACCORDANCE WITH 49 CFR, PART 40.

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

8 (6) BREATH ALCOHOL TESTS MUST BE ADMINISTERED BY A CERTIFIED BREATH ALCOHOL
9 TECHNICIAN AND MAY ONLY BE CONDUCTED USING TESTING EQUIPMENT THAT APPEARS ON THE
10 LIST OF CONFORMING PRODUCTS PUBLISHED IN THE FEDERAL REGISTER.

11 (7) A BREATH ALCOHOL TEST RESULT MUST INDICATE AN ALCOHOL CONCENTRATION OF
12 GREATER THAN 0.04 FOR A PERSON TO BE CONSIDERED AS HAVING ALCOHOL IN THE PERSON'S
13 BODY.

14
15 NEW SECTION. SECTION 4. QUALIFIED TESTING PROGRAM -- ALLOWABLE TYPES --
16 PROCEDURES. EACH OF THE FOLLOWING ACTIVITIES IS PERMISSIBLE IN THE IMPLEMENTATION OF A
17 QUALIFIED TESTING PROGRAM:

18 (1) AN EMPLOYER MAY TEST ANY NEWLY HIRED PROSPECTIVE EMPLOYEE WITHIN 5 DAYS
19 OF THE EMPLOYEE'S REPORTING TO WORK.

20 (2) AN EMPLOYER MAY USE RANDOM TESTING IF THE EMPLOYER'S CONTROLLED SUBSTANCE
21 AND ALCOHOL POLICY INCLUDES ONE OR BOTH OF THE FOLLOWING PROCEDURES:

22 (A) AN EMPLOYER OR AN EMPLOYER'S REPRESENTATIVE MAY ESTABLISH A DATE WHEN ALL
23 SALARIED AND WAGE-EARNING EMPLOYEES WILL BE REQUIRED TO UNDERGO CONTROLLED
24 SUBSTANCE OR ALCOHOL TESTS, OR BOTH.

25 (B) AN EMPLOYER MAY MANAGE OR CONTRACT WITH A THIRD PARTY TO ESTABLISH AND
26 ADMINISTER A RANDOM TESTING PROCESS THAT MUST INCLUDE:

27 (I) AN ESTABLISHED CALENDAR PERIOD FOR TESTING;

28 (II) AN ESTABLISHED TESTING RATE WITHIN THE CALENDAR PERIOD;

29 (III) A RANDOM SELECTION PROCESS THAT WILL DETERMINE WHO WILL BE TESTED ON ANY
30 GIVEN DATE DURING THE CALENDAR PERIOD FOR TESTING;

1 (IV) ALL SUPERVISORY AND MANAGERIAL EMPLOYEES IN THE RANDOM SELECTION AND
2 TESTING PROCESS; AND

3 (V) A PROCEDURE THAT REQUIRES THE EMPLOYER TO OBTAIN A SIGNED STATEMENT FROM
4 EACH EMPLOYEE THAT CONFIRMS THAT THE EMPLOYEE HAS RECEIVED A WRITTEN DESCRIPTION OF
5 THE RANDOM SELECTION PROCESS AND THAT REQUIRES THE EMPLOYER TO MAINTAIN THE
6 STATEMENT IN THE EMPLOYEE'S PERSONNEL FILE. THE SELECTION OF EMPLOYEES IN A RANDOM
7 TESTING PROCEDURE MUST BE MADE BY A SCIENTIFICALLY VALID METHOD, SUCH AS A RANDOM
8 NUMBER TABLE OR A COMPUTER-BASED RANDOM NUMBER GENERATOR TABLE.

9 (3) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO SUBMIT TO FOLLOWUP TESTS IF THE
10 EMPLOYER DETERMINES THAT THE EMPLOYEE HAS MISUSED CONTROLLED SUBSTANCES OR
11 ALCOHOL AT THE WORK SITE. THE FOLLOWUP TESTS MUST BE DESCRIBED IN THE EMPLOYER'S
12 CONTROLLED SUBSTANCE AND ALCOHOL POLICY AND MAY BE CONDUCTED FOR UP TO 1 YEAR FROM
13 THE TIME THAT THE EMPLOYER FIRST REQUIRES A FOLLOWUP TEST.

14 (4) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO BE TESTED FOR CONTROLLED
15 SUBSTANCES OR ALCOHOL IF THE EMPLOYER HAS REASON TO SUSPECT THAT AN EMPLOYEE'S
16 FACULTIES ARE IMPAIRED ON THE JOB AS A RESULT OF THE USE OF A CONTROLLED SUBSTANCE OR
17 ALCOHOL CONSUMPTION. AN EMPLOYER SHALL COMPLY WITH THE SUPERVISORY TRAINING
18 REQUIREMENT IN 49 CFR, PART 382.603, WHENEVER THE EMPLOYER REQUIRES A TEST ON THE BASIS
19 OF REASONABLE SUSPICION.

20 (5) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO BE TESTED FOR CONTROLLED
21 SUBSTANCES OR ALCOHOL IF THE EMPLOYER HAS REASON TO BELIEVE THAT THE EMPLOYEE MAY
22 HAVE CONTRIBUTED TO A WORK-RELATED ACCIDENT THAT HAS CAUSED DEATH OR PERSONAL
23 INJURY OR PROPERTY DAMAGE IN EXCESS OF \$1,500.

24
25 NEW SECTION. SECTION 5. EMPLOYEE'S RIGHT OF REBUTTAL. THE EMPLOYER SHALL PROVIDE
26 AN EMPLOYEE WHO HAS BEEN TESTED UNDER ANY QUALIFIED TESTING PROGRAM DESCRIBED IN
27 [SECTION 5 4] WITH A COPY OF THE TEST REPORT. THE EMPLOYER IS ALSO REQUIRED TO OBTAIN,
28 AT THE EMPLOYEE'S REQUEST AND AT THE EMPLOYEE'S EXPENSE, AN ADDITIONAL TEST OF THE
29 URINE SPLIT SAMPLE BY AN INDEPENDENT LABORATORY SELECTED BY THE PERSON TESTED. THE
30 EMPLOYEE MUST BE PROVIDED THE OPPORTUNITY TO REBUT OR EXPLAIN THE RESULTS OF ANY

1 TEST.

2

3 NEW SECTION. SECTION 6. LIMITATION ON ADVERSE ACTION. ADVERSE ACTION MAY NOT
 4 BE TAKEN BY THE EMPLOYER IF THE EMPLOYEE PRESENTS A REASONABLE EXPLANATION OR MEDICAL
 5 OPINION INDICATING THAT THE ORIGINAL TEST RESULTS WERE NOT CAUSED BY ILLEGAL USE OF
 6 CONTROLLED SUBSTANCES OR BY ALCOHOL CONSUMPTION. IF THE EMPLOYEE PRESENTS A
 7 REASONABLE EXPLANATION OR MEDICAL OPINION, THE TEST RESULTS MUST BE REMOVED FROM THE
 8 EMPLOYEE'S RECORD AND DESTROYED.

9

10 NEW SECTION. Section 7. Confidentiality of results. (1) Except as provided in subsection (2) and
 11 except for information that is required by law to be reported to a state or federal licensing authority, all
 12 information, interviews, reports, statements, memoranda, or test results received by an employer through
 13 a qualified testing program are confidential communications and may not be used or received in evidence,
 14 obtained in discovery, or disclosed in any public or private proceeding.

15 (2) Material that is confidential under subsection (1) may be used in a proceeding related to:

16 (a) legal action arising out of an employer's implementation of [sections 1 through ~~5-8~~ 7]; or

17 (b) inquiries relating to a workplace accident involving death, physical injury, or property damage
 18 in excess of \$1,500 when there is reason to believe that the tested employee may have caused or
 19 contributed to the accident.

20

21 **Section 8.** Section 39-2-304, MCA, is amended to read:

22 "**39-2-304. Lie detector tests prohibited** ~~—regulation of blood and urine testing.~~ (1) A person, firm,
 23 corporation, or other business entity or its representative may not require:

24 ~~(a) as a condition for employment or continuation of employment, a person to take a polygraph test~~
 25 ~~or any form of a mechanical lie detector test;~~ as a condition for employment or continuation of employment.

26 ~~(b) as a condition for employment, a person to submit to a blood or urine test, except for~~
 27 ~~employment in:~~

28 ~~(i) hazardous work environments;~~

29 ~~(ii) jobs the primary responsibility of which is security, public safety, or fiduciary responsibility; or~~

30 ~~(iii) jobs involving the intrastate commercial transportation of persons or commodities by a~~

1 ~~commercial motor carrier or an employee subject to driver qualification requirements; and~~

2 ~~(c) as a condition for continuation of employment, an employee to submit to a blood or urine test,~~
3 ~~except when:~~

4 ~~(i) the employer has reason to believe that the employee's faculties are impaired on the job as a~~
5 ~~result of alcohol consumption or illegal drug use;~~

6 ~~(ii) the employer has reason to believe that an employee may have contributed to a work-related~~
7 ~~accident that causes death or personal injury or property damage in excess of \$1,500; or~~

8 ~~(iii) drug testing is being conducted at an employee's regular biennial physical for employment in~~
9 ~~jobs involving the intrastate commercial motor carrier transportation of persons or commodities.~~

10 ~~(2) Prior to the administration of a drug or alcohol test, the person, firm, corporation, or other~~
11 ~~business entity or its representative shall adopt the written testing procedure that is provided in 49 CFR,~~
12 ~~part 40, and make it available to all persons subject to testing.~~

13 ~~(3) The person, firm, corporation, or other business entity or its representative shall provide a copy~~
14 ~~of drug or alcohol test results to the person tested and provide the person with the opportunity, at the~~
15 ~~expense of the person requiring the test, to obtain a confirmatory test of the blood or urine by an~~
16 ~~independent laboratory selected by the person tested. The person tested must be given the opportunity to~~
17 ~~rebut or explain the results of either test or both tests. In the case of an accident referred to in subsection~~
18 ~~(1)(c)(iii), the tests may not be delayed, but the person, firm, corporation, or other business entity or its~~
19 ~~representative shall, as soon as possible, make a written finding as to whether the act or failure to act is~~
20 ~~believed to be a direct or proximate cause of the accident and shall provide the tested employee with a~~
21 ~~copy of the finding. The written record of a blood or urine test of an employee who is required to submit~~
22 ~~to testing pursuant to subsection (1)(c)(iii) and whose acts or failure to act is subsequently found not to be~~
23 ~~the direct or proximate cause of a work-related accident must be removed from the employee's work record~~
24 ~~and be destroyed.~~

25 ~~(4) Adverse action may not be taken against a person tested under subsections (1)(b), (1)(c), (2),~~
26 ~~and (3) if the person tested presents a reasonable explanation or medical opinion indicating that the results~~
27 ~~of the test were not caused by alcohol consumption or illegal drug use.~~

28 ~~(5) A person who violates this section is guilty of a misdemeanor.~~

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24 prescription or as authorized by law.

25 (2)(4) "Employee" means an individual engaged in the performance, SUPERVISION, OR
26 MANAGEMENT of work IN A HAZARDOUS WORK ENVIRONMENT, SECURITY POSITION, POSITION
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28 an independent contractor. THE TERM INCLUDES AN ELECTED OFFICIAL.

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7 (C) THAT INVOLVE HANDLING OR PROXIMITY TO FLAMMABLE MATERIALS, EXPLOSIVES,
 8 TOXIC CHEMICALS, OR SIMILAR SUBSTANCES.

9 (7) "INITIAL TEST" MEANS SCIENTIFICALLY ACCEPTED ANALYTICAL METHODS AND
 10 PROCEDURES THAT HAVE BEEN CLEARED BY THE FEDERAL FOOD AND DRUG ADMINISTRATION FOR
 11 COMMERCIAL DISTRIBUTION. SPECIMEN COLLECTION AND CHAIN OF CUSTODY PROCEDURES FOR
 12 AN INITIAL TEST MUST CONFORM TO 49 CFR, PART 40.

13 ~~(4)(6)(7)(8)~~ "Medical review officer" means a ~~state-licensed~~ LICENSED physician trained in the field
 14 of substance abuse.

15 ~~(5)(7)(8)(9)~~ "Prospective employee" means an individual who has made a written or oral application
 16 to an employer to become an employee.

17 ~~(6)(8)(9)(10)~~ "Qualified testing program" means a program to test for the presence of controlled
 18 substances and alcohol that meets the criteria set forth in [sections 43 and 54].

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 20 substance or a breath alcohol test to determine the presence of alcohol.

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13 SUBSTANCE AND ALCOHOL TESTING PROCEDURES MUST CONFORM TO 49 CFR, PART 40, EXCEPT
14 AN INITIAL TEST FOR A CONTROLLED SUBSTANCE OR ALCOHOL MAY BE USED AS PROVIDED IN
15 SUBSECTION (8). At a minimum, the policies and procedures must require:

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

18 (b) the employer's ~~proposal~~ PROGRAM for REGULARLY educating or providing information to
19 employees on the health AND WORKPLACE SAFETY risks associated with the use of controlled substances
20 and alcohol;

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

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24 treatment, or rehabilitation programs that are available to employees;

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

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29 ~~circumstances that may trigger an immediate test~~ IDENTIFICATION OF THE TYPES OF CONTROLLED
30 SUBSTANCE AND ALCOHOL TESTS TO BE USED FROM THE TYPES OF TESTS LISTED IN [SECTION 4];

1 (g) a list of controlled substances for which the employer intends to test AND A STATED
 2 ALCOHOL CONCENTRATION LEVEL ABOVE WHICH A TESTED EMPLOYEE MUST BE SANCTIONED;

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 14 ADMINISTRATIVE CLAIM arising out of the employer's implementation of [sections 1 through ~~5-87~~] or in
 15 response to inquiries relating to a workplace accident involving death, physical injury, or property damage
 16 in excess of \$1,500, when there is reason to believe that the tested employee may have caused or
 17 contributed to the accident; and

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

21 (2) In addition to imposing appropriate sanctions on an employee for violation of the employer's
 22 standards of conduct, an employer may require an employee who tests positive on a test for controlled
 23 substances or alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation
 24 program as a condition of continued employment. An employer may require the employee to submit to
 25 periodic ~~retesting~~ FOLLOWUP TESTING as a condition of the counseling, treatment, or rehabilitation
 26 program.

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

29 (4) The collection of TRANSPORT, AND CONFIRMATION TESTING OF URINE samples must be
 30 performed IN ~~in a manner designed to protect the privacy of the employee, using, when practicable, screens~~

1 ~~or stalls, except that if an employer has reason to believe an employee may adulterate or substitute the~~
2 ~~required sample, the employer may require that the sample be provided under the direct supervision of~~
3 ~~testing personnel.~~

4 ~~(5) Samples must be handled under strict forensic chain of custody procedures. The procedures~~
5 ~~must require that a sample be collected, stored, and transported in a manner that documents and preserves~~
6 ~~the identity of each sample and prevents the adulteration, contamination, or erroneous identification of test~~
7 ~~results.~~

8 ~~(6) Testing of samples must be performed according to scientifically accepted analytical procedures~~
9 ~~by a qualified laboratory certified by the national institute on drug abuse. Confirmatory tests of an initial~~
10 ~~screening test must be conducted by the same laboratory using gas chromatography mass spectrometry~~
11 ~~techniques or techniques that are of comparable or superior quality with respect to validation~~

12 ACCORDANCE WITH 49 CFR, PART 40.

13 ~~(7)(5)~~ Before an employer may take any action based on a positive test result, the employer shall
14 have the results reviewed and certified by a medical review officer who is trained in the field of substance
15 abuse. An employee or prospective employee must be given the opportunity to provide notification to the
16 medical review officer of any medical information that is relevant to interpreting test results, including
17 information concerning currently or recently used prescription or nonprescription drugs.

18 (6) BREATH ALCOHOL TESTS MUST BE ADMINISTERED BY A CERTIFIED BREATH ALCOHOL
19 TECHNICIAN AND MAY ONLY BE CONDUCTED USING TESTING EQUIPMENT THAT APPEARS ON THE
20 LIST OF CONFORMING PRODUCTS PUBLISHED IN THE FEDERAL REGISTER.

21 (7) A BREATH ALCOHOL TEST RESULT MUST INDICATE AN ALCOHOL CONCENTRATION OF
22 GREATER THAN 0.04 FOR A PERSON TO BE CONSIDERED AS HAVING ALCOHOL IN THE PERSON'S
23 BODY.

24 (8) AN EMPLOYER MAY USE AN INITIAL TEST TO SCREEN AN EMPLOYEE OR PROSPECTIVE
25 EMPLOYEE FOR THE USE OF A CONTROLLED SUBSTANCE OR ALCOHOL. IF THE INITIAL TEST RESULTS
26 INDICATE A POTENTIAL POSITIVE, THE INITIAL TEST MUST BE CONFIRMED. CONFIRMATION TESTS
27 MUST BE COMPLETED USING COLLECTION, TRANSPORTING, AND TESTING PROCEDURES THAT
28 CONFORM TO 49 CFR, PART 40. ONLY CONFIRMED TEST RESULTS MAY BE USED TO DETERMINE IF
29 AN EMPLOYEE TESTS POSITIVE FOR A CONTROLLED SUBSTANCE OR ALCOHOL. ONLY CONFIRMED
30 POSITIVE OR NEGATIVE TEST RESULTS MAY BE ENTERED INTO AN EMPLOYEE'S PERSONNEL FILE.

1 NEW SECTION. SECTION 4. QUALIFIED TESTING PROGRAM -- ALLOWABLE TYPES --
2 PROCEDURES. EACH OF THE FOLLOWING ACTIVITIES IS PERMISSIBLE IN THE IMPLEMENTATION OF A
3 QUALIFIED TESTING PROGRAM:

4 (1) AN EMPLOYER MAY TEST ANY NEWLY HIRED PROSPECTIVE EMPLOYEE AS A CONDITION
5 OF HIRE WITHIN 5 DAYS OF THE EMPLOYEE'S REPORTING TO WORK.

6 (2) AN EMPLOYER MAY USE RANDOM TESTING IF THE EMPLOYER'S CONTROLLED SUBSTANCE
7 AND ALCOHOL POLICY INCLUDES ONE OR BOTH OF THE FOLLOWING PROCEDURES:

8 (A) AN EMPLOYER OR AN EMPLOYER'S REPRESENTATIVE MAY ESTABLISH A DATE WHEN ALL
9 SALARIED AND WAGE-EARNING EMPLOYEES WILL BE REQUIRED TO UNDERGO CONTROLLED
10 SUBSTANCE OR ALCOHOL TESTS, OR BOTH.

11 (B) AN EMPLOYER MAY MANAGE OR CONTRACT WITH A THIRD PARTY TO ESTABLISH AND
12 ADMINISTER A RANDOM TESTING PROCESS THAT MUST INCLUDE:

13 (I) AN ESTABLISHED CALENDAR PERIOD FOR TESTING;

14 (II) AN ESTABLISHED TESTING RATE WITHIN THE CALENDAR PERIOD;

15 (III) A RANDOM SELECTION PROCESS THAT WILL DETERMINE WHO WILL BE TESTED ON ANY
16 GIVEN DATE DURING THE CALENDAR PERIOD FOR TESTING;

17 (IV) ALL SUPERVISORY AND MANAGERIAL EMPLOYEES IN THE RANDOM SELECTION AND
18 TESTING PROCESS; AND

19 (V) A PROCEDURE THAT REQUIRES THE EMPLOYER TO OBTAIN A SIGNED STATEMENT FROM
20 EACH EMPLOYEE THAT CONFIRMS THAT THE EMPLOYEE HAS RECEIVED A WRITTEN DESCRIPTION OF
21 THE RANDOM SELECTION PROCESS AND THAT REQUIRES THE EMPLOYER TO MAINTAIN THE
22 STATEMENT IN THE EMPLOYEE'S PERSONNEL FILE. THE SELECTION OF EMPLOYEES IN A RANDOM
23 TESTING PROCEDURE MUST BE MADE BY A SCIENTIFICALLY VALID METHOD, SUCH AS A RANDOM
24 NUMBER TABLE OR A COMPUTER-BASED RANDOM NUMBER GENERATOR TABLE.

25 (3) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO SUBMIT TO FOLLOWUP TESTS IF THE
26 EMPLOYER DETERMINES THAT THE EMPLOYEE HAS MISUSED CONTROLLED SUBSTANCES OR
27 ALCOHOL AT THE WORK SITE EMPLOYEE HAS HAD A VERIFIED POSITIVE TEST FOR A CONTROLLED
28 SUBSTANCE OR FOR ALCOHOL. THE FOLLOWUP TESTS MUST BE DESCRIBED IN THE EMPLOYER'S
29 CONTROLLED SUBSTANCE AND ALCOHOL POLICY AND MAY BE CONDUCTED FOR UP TO 1 YEAR FROM
30 THE TIME THAT THE EMPLOYER FIRST REQUIRES A FOLLOWUP TEST.

1 (4) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO BE TESTED FOR CONTROLLED
2 SUBSTANCES OR ALCOHOL IF THE EMPLOYER HAS REASON TO SUSPECT THAT AN EMPLOYEE'S
3 FACULTIES ARE IMPAIRED ON THE JOB AS A RESULT OF THE USE OF A CONTROLLED SUBSTANCE OR
4 ALCOHOL CONSUMPTION. AN EMPLOYER SHALL COMPLY WITH THE SUPERVISORY TRAINING
5 REQUIREMENT IN 49 CFR, PART 382.603, WHENEVER THE EMPLOYER REQUIRES A TEST ON THE BASIS
6 OF REASONABLE SUSPICION.

7 (5) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO BE TESTED FOR CONTROLLED
8 SUBSTANCES OR ALCOHOL IF THE EMPLOYER HAS REASON TO BELIEVE THAT THE EMPLOYEE MAY
9 HAVE CONTRIBUTED TO EMPLOYEE'S ACT OR FAILURE TO ACT IS A DIRECT OR PROXIMATE CAUSE
10 OF A WORK-RELATED ACCIDENT THAT HAS CAUSED DEATH OR PERSONAL INJURY OR PROPERTY
11 DAMAGE IN EXCESS OF \$1,500.

12
13 NEW SECTION. SECTION 5. EMPLOYEE'S RIGHT OF REBUTTAL. THE EMPLOYER SHALL PROVIDE
14 AN EMPLOYEE WHO HAS BEEN TESTED UNDER ANY QUALIFIED TESTING PROGRAM DESCRIBED IN
15 [SECTION 5 4] WITH A COPY OF THE TEST REPORT. THE EMPLOYER IS ALSO REQUIRED TO OBTAIN,
16 AT THE EMPLOYEE'S REQUEST AND AT THE EMPLOYEE'S EXPENSE, AN ADDITIONAL TEST OF THE
17 URINE SPLIT SAMPLE BY AN INDEPENDENT LABORATORY SELECTED BY THE PERSON TESTED. THE
18 EMPLOYER SHALL PAY FOR THE ADDITIONAL TESTS IF THE ADDITIONAL TEST RESULTS ARE
19 NEGATIVE, AND THE EMPLOYEE SHALL PAY FOR THE ADDITIONAL TESTS IF THE ADDITIONAL TEST
20 RESULTS ARE POSITIVE. THE EMPLOYEE MUST BE PROVIDED THE OPPORTUNITY TO REBUT OR
21 EXPLAIN THE RESULTS OF ANY TEST.

22
23 NEW SECTION. SECTION 6. LIMITATION ON ADVERSE ACTION. ADVERSE NO ADVERSE
24 ACTION, INCLUDING FOLLOWUP TESTING, MAY NOT BE TAKEN BY THE EMPLOYER IF THE EMPLOYEE
25 PRESENTS A REASONABLE EXPLANATION OR MEDICAL OPINION INDICATING THAT THE ORIGINAL TEST
26 RESULTS WERE NOT CAUSED BY ILLEGAL USE OF CONTROLLED SUBSTANCES OR BY ALCOHOL
27 CONSUMPTION. IF THE EMPLOYEE PRESENTS A REASONABLE EXPLANATION OR MEDICAL OPINION,
28 THE TEST RESULTS MUST BE REMOVED FROM THE EMPLOYEE'S RECORD AND DESTROYED.

29
30 NEW SECTION. Section 7. Confidentiality of results. (1) Except as provided in subsection (2) and

1 except for information that is required by law to be reported to a state or federal licensing authority, all
 2 information, interviews, reports, statements, memoranda, or test results received by an employer through
 3 a qualified testing program are confidential communications and may not be used or received in evidence,
 4 obtained in discovery, or disclosed in any public or private proceeding.

5 (2) Material that is confidential under subsection (1) may be used in a proceeding related to:

6 (a) legal action arising out of an employer's implementation of [sections 1 through ~~5-8~~ 7]; or

7 (b) inquiries relating to a workplace accident involving death, physical injury, or property damage
 8 in excess of \$1,500 when there is reason to believe that the tested employee may have caused or
 9 contributed to the accident.

10

11 **Section 8.** Section 39-2-304, MCA, is amended to read:

12 "**39-2-304. Lie detector tests prohibited —~~regulation of blood and urine testing.~~** (1) A person, firm,
 13 corporation, or other business entity or its representative may not require:

14 ~~(a) as a condition for employment or continuation of employment, a person to take a polygraph test~~
 15 ~~or any form of a mechanical lie detector test;~~ as a condition for employment or continuation of employment.

16 ~~(b) as a condition for employment, a person to submit to a blood or urine test, except for~~
 17 ~~employment in:~~

18 ~~(i) hazardous work environments;~~

19 ~~(ii) jobs the primary responsibility of which is security, public safety, or fiduciary responsibility; or~~

20 ~~(iii) jobs involving the intrastate commercial transportation of persons or commodities by a~~
 21 ~~commercial motor carrier or an employee subject to driver qualification requirements; and~~

22 ~~(c) as a condition for continuation of employment, an employee to submit to a blood or urine test,~~
 23 ~~except when:~~

24 ~~(i) the employer has reason to believe that the employee's faculties are impaired on the job as a~~
 25 ~~result of alcohol consumption or illegal drug use;~~

26 ~~(ii) the employer has reason to believe that an employee may have contributed to a work-related~~
 27 ~~accident that causes death or personal injury or property damage in excess of \$1,500; or~~

28 ~~(iii) drug testing is being conducted at an employee's regular biennial physical for employment in~~
 29 ~~jobs involving the intrastate commercial motor carrier transportation of persons or commodities.~~

30 ~~(2) Prior to the administration of a drug or alcohol test, the person, firm, corporation, or other~~

1 ~~business entity or its representative shall adopt the written testing procedure that is provided in 49 CFR,~~
 2 ~~part 40, and make it available to all persons subject to testing.~~

3 ~~(3) The person, firm, corporation, or other business entity or its representative shall provide a copy~~
 4 ~~of drug or alcohol test results to the person tested and provide the person with the opportunity, at the~~
 5 ~~expense of the person requiring the test, to obtain a confirmatory test of the blood or urine by an~~
 6 ~~independent laboratory selected by the person tested. The person tested must be given the opportunity to~~
 7 ~~rebut or explain the results of either test or both tests. In the case of an accident referred to in subsection~~
 8 ~~(1)(c)(iii), the tests may not be delayed, but the person, firm, corporation, or other business entity or its~~
 9 ~~representative shall, as soon as possible, make a written finding as to whether the act or failure to act is~~
 10 ~~believed to be a direct or proximate cause of the accident and shall provide the tested employee with a~~
 11 ~~copy of the finding. The written record of a blood or urine test of an employee who is required to submit~~
 12 ~~to testing pursuant to subsection (1)(c)(iii) and whose acts or failure to act is subsequently found not to be~~
 13 ~~the direct or proximate cause of a work-related accident must be removed from the employee's work record~~
 14 ~~and be destroyed.~~

15 ~~(4) Adverse action may not be taken against a person tested under subsections (1)(b), (1)(c), (2),~~
 16 ~~and (3) if the person tested presents a reasonable explanation or medical opinion indicating that the results~~
 17 ~~of the test were not caused by alcohol consumption or illegal drug use.~~

18 ~~(5) A person who violates this section is guilty of a misdemeanor.~~

19 ~~(6) As used in this section:~~

20 ~~(a) "commercial motor carrier" has the meaning provided in 61-1-320 and in 69-12-101; and~~

21 ~~(b) "intra-state" means commerce or trade that is begun, carried on, and completed wholly in this~~
 22 ~~state."~~

23

24 **NEW SECTION. Section 9. Codification instruction.** [Sections 1 through ~~5-8~~ 7] are intended to
 25 be codified as an integral part of Title 39, chapter 2, part 2, and the provisions of Title 39, chapter 2, part
 26 2, apply to [sections 1 through ~~5-8~~ 7].

27

28 **NEW SECTION. SECTION 10. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID**
 29 **PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT]**
 30 **IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID**

1 APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

2 -END-

1 HOUSE BILL NO. 345

2 INTRODUCED BY MASOLO

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE PRIVATE WORKFORCE DRUG AND ALCOHOL
5 TESTING ACT; ESTABLISHING CRITERIA FOR DRUG AND ALCOHOL TESTING OF EMPLOYEES AND
6 PROSPECTIVE EMPLOYEES; ~~LIMITING THE LIABILITY OF EMPLOYERS USING QUALIFIED DRUG AND~~
7 ~~ALCOHOL TESTING PROGRAMS~~; PROVIDING FOR CONFIDENTIALITY OF TEST RESULTS EXCEPT IN
8 CERTAIN CIRCUMSTANCES; AND AMENDING SECTION 39-2-304, MCA."

9
10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11
12 NEW SECTION. Section 1. Short title. [Sections 1 through ~~5-8~~ 7] may be cited as the "~~Private~~
13 ~~Workforce~~ "WORKFORCE Drug and Alcohol Testing Act".

14
15 NEW SECTION. Section 2. Definitions. As used in [sections 1 through ~~5-8~~ 7], the following
16 definitions apply:

17 (1) "ALCOHOL" MEANS AN INTOXICATING AGENT IN ALCOHOLIC BEVERAGES, ETHYL
18 ALCOHOL, ALSO CALLED ETHANOL, OR THE HYDRATED OXIDE OF ETHYL.

19 (2) "ALCOHOL CONCENTRATION" MEANS THE ALCOHOL IN A VOLUME OF BREATH EXPRESSED
20 IN TERMS OF GRAMS OF ALCOHOL PER 210 LITERS OF BREATH, AS INDICATED BY AN EVIDENTIAL
21 BREATH TEST.

22 ~~(1)(3)~~ (3) "Controlled substance" means a dangerous drug, as defined ~~as 50-32-101, and listed in~~
23 ~~Schedules I or II in 50-32-222 and 50-32-224~~ IN 49 CFR, PART 40, except a drug used pursuant to a valid
24 prescription or as authorized by law.

25 ~~(2)(4)~~ (4) "Employee" means an individual engaged in the performance, SUPERVISION, OR
26 MANAGEMENT of work IN A HAZARDOUS WORK ENVIRONMENT, SECURITY POSITION, POSITION
27 AFFECTING PUBLIC SAFETY, OR FIDUCIARY POSITION for ~~a private~~ AN employer and does not include
28 an independent contractor. THE TERM INCLUDES AN ELECTED OFFICIAL.

29 ~~(3)(5)~~ (5) "Employer" means a person or entity ~~in the private sector~~ that has one or more employees
30 and that is located in or doing business in Montana.

1 (6) "HAZARDOUS WORK ENVIRONMENT" INCLUDES BUT IS NOT LIMITED TO POSITIONS:

2 (A) FOR WHICH DRUG CONTROLLED SUBSTANCE AND ALCOHOL TESTING IS MANDATED BY
 3 FEDERAL LAW, SUCH AS AVIATION, INTERSTATE COMMERCIAL MOTOR CARRIER, RAILROAD,
 4 PIPELINE, AND COMMERCIAL MARINE EMPLOYEES;

5 (B) THAT INVOLVE THE OPERATION OF OR WORK IN PROXIMITY TO CONSTRUCTION
 6 EQUIPMENT, INDUSTRIAL MACHINERY, OR MINING ACTIVITIES; OR

7 (C) THAT INVOLVE HANDLING OR PROXIMITY TO FLAMMABLE MATERIALS, EXPLOSIVES,
 8 TOXIC CHEMICALS, OR SIMILAR SUBSTANCES.

9 (7) "INITIAL TEST" MEANS SCIENTIFICALLY ACCEPTED ANALYTICAL METHODS AND
 10 PROCEDURES THAT HAVE BEEN CLEARED BY THE FEDERAL FOOD AND DRUG ADMINISTRATION FOR
 11 COMMERCIAL DISTRIBUTION. SPECIMEN COLLECTION AND CHAIN OF CUSTODY PROCEDURES FOR
 12 AN INITIAL TEST MUST CONFORM TO 49 CFR, PART 40.

13 ~~(4)(6)(7)(8)~~ "Medical review officer" means a ~~state-licensed~~ LICENSED physician trained in the field
 14 of substance abuse.

15 ~~(5)(7)(8)(9)~~ "Prospective employee" means an individual who has made a written or oral application
 16 to an employer to become an employee.

17 ~~(6)(9)(9)(10)~~ "Qualified testing program" means a program to test for the presence of controlled
 18 substances and alcohol that meets the criteria set forth in [sections 43 and 54].

19 ~~(7)(9)(10)(11)~~ "Sample" means a urine ~~or blood~~ specimen to determine the presence of a controlled
 20 substance or a breath alcohol test to determine the presence of alcohol.

21
 22 ~~NEW SECTION. Section 3. Limitations on employer liability. (1) An employer is not liable for~~
 23 ~~monetary damages arising out of a drug or alcohol test that the employer requires an employee or~~
 24 ~~prospective employee to take if the test is administered pursuant to a qualified testing program that is~~
 25 ~~adopted and implemented by an employer to test employees for the presence of controlled substances or~~
 26 ~~alcohol, unless:~~

27 ~~(a) the employer took disciplinary action against the employee based on a false test result and the~~
 28 ~~employer's reliance on the test result was not reasonable or was in bad faith. There is a rebuttable~~
 29 ~~presumption that an employer's reliance on a test result is reasonable if the employer complies with the~~
 30 ~~provisions of [sections 4 and 5 THROUGH 8] and rules adopted pursuant to [sections 4 and 5 THROUGH~~

1 ~~8).~~

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

4 ~~(2) An employer is not liable for monetary damages arising out of a drug or alcohol test that fails~~
5 ~~to detect a specific controlled substance or other substance, disease, infectious agent, virus, or physical~~
6 ~~abnormality, problem, or defect of any kind.~~

7

8 **NEW SECTION. Section 3. Qualified testing program.** A qualified testing program must comply
9 with the following criteria:

10 (1) Testing must be conducted according to the terms of written policies and procedures that must
11 be adopted by the employer and must be available for review by all employees and prospective employees
12 60 days before ~~implementation.~~ THE TERMS ARE IMPLEMENTED OR CHANGED. CONTROLLED
13 SUBSTANCE AND ALCOHOL TESTING PROCEDURES MUST CONFORM TO 49 CFR, PART 40, EXCEPT
14 AN INITIAL TEST FOR A CONTROLLED SUBSTANCE OR ALCOHOL MAY BE USED AS PROVIDED IN
15 SUBSECTION (8). At a minimum, the policies and procedures must require:

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

18 (b) the employer's ~~proposal~~ PROGRAM for REGULARLY educating or providing information to
19 employees on the health AND WORKPLACE SAFETY risks associated with the use of controlled substances
20 and alcohol;

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

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

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

28 (f) ~~a statement that employees may be tested, including a discussion~~ DESCRIPTION of the
29 ~~circumstances that may trigger an immediate test~~ IDENTIFICATION OF THE TYPES OF CONTROLLED
30 SUBSTANCE AND ALCOHOL TESTS TO BE USED FROM THE TYPES OF TESTS LISTED IN [SECTION 4];

1 (g) a list of controlled substances for which the employer intends to test AND A STATED
 2 ALCOHOL CONCENTRATION LEVEL ABOVE WHICH A TESTED EMPLOYEE MUST BE SANCTIONED;

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

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

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

9 (i) the tested employee;

10 (ii) ~~employees or agents of the employer who are specifically authorized by the tested employee~~
 11 ~~to receive~~ RECEIVE ~~the employee's test results~~ THE DESIGNATED REPRESENTATIVE OF THE EMPLOYER;

12 or

13 (iii) ~~in a proceeding related to a legal action~~ IN CONNECTION WITH ANY LEGAL OR
 14 ADMINISTRATIVE CLAIM arising out of the employer's implementation of [sections 1 through ~~5-87~~] or in
 15 response to inquiries relating to a workplace accident involving death, physical injury, or property damage
 16 in excess of \$1,500, when there is reason to believe that the tested employee may have caused or
 17 contributed to the accident; and

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

21 (2) In addition to imposing appropriate sanctions on an employee for violation of the employer's
 22 standards of conduct, an employer may require an employee who tests positive on a test for controlled
 23 substances or alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation
 24 program as a condition of continued employment. An employer may require the employee to submit to
 25 periodic ~~retesting~~ FOLLOWUP TESTING as a condition of the counseling, treatment, or rehabilitation
 26 program.

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

29 (4) The collection of TRANSPORT, AND CONFIRMATION TESTING OF URINE samples must be
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8 ~~(6) Testing of samples must be performed according to scientifically accepted analytical procedures~~
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10 ~~screening test must be conducted by the same laboratory using gas chromatography mass spectrometry~~
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13 ~~(7)(5)~~ Before an employer may take any action based on a positive test result, the employer shall
14 have the results reviewed and certified by a medical review officer who is trained in the field of substance
15 abuse. An employee or prospective employee must be given the opportunity to provide notification to the
16 medical review officer of any medical information that is relevant to interpreting test results, including
17 information concerning currently or recently used prescription or nonprescription drugs.

18 (6) BREATH ALCOHOL TESTS MUST BE ADMINISTERED BY A CERTIFIED BREATH ALCOHOL
19 TECHNICIAN AND MAY ONLY BE CONDUCTED USING TESTING EQUIPMENT THAT APPEARS ON THE
20 LIST OF CONFORMING PRODUCTS PUBLISHED IN THE FEDERAL REGISTER.

21 (7) A BREATH ALCOHOL TEST RESULT MUST INDICATE AN ALCOHOL CONCENTRATION OF
22 GREATER THAN 0.04 FOR A PERSON TO BE CONSIDERED AS HAVING ALCOHOL IN THE PERSON'S
23 BODY.

24 (8) AN EMPLOYER MAY USE AN INITIAL TEST TO SCREEN AN EMPLOYEE OR PROSPECTIVE
25 EMPLOYEE FOR THE USE OF A CONTROLLED SUBSTANCE OR ALCOHOL. IF THE INITIAL TEST RESULTS
26 INDICATE A POTENTIAL POSITIVE, THE INITIAL TEST MUST BE CONFIRMED. CONFIRMATION TESTS
27 MUST BE COMPLETED USING COLLECTION, TRANSPORTING, AND TESTING PROCEDURES THAT
28 CONFORM TO 49 CFR, PART 40. ONLY CONFIRMED TEST RESULTS MAY BE USED TO DETERMINE IF
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3 QUALIFIED TESTING PROGRAM:

4 (1) AN EMPLOYER MAY TEST ANY NEWLY HIRED PROSPECTIVE EMPLOYEE AS A CONDITION
5 OF HIRE WITHIN 5 DAYS OF THE EMPLOYEE'S REPORTING TO WORK.

6 (2) AN EMPLOYER MAY USE RANDOM TESTING IF THE EMPLOYER'S CONTROLLED SUBSTANCE
7 AND ALCOHOL POLICY INCLUDES ONE OR BOTH OF THE FOLLOWING PROCEDURES:

8 (A) AN EMPLOYER OR AN EMPLOYER'S REPRESENTATIVE MAY ESTABLISH A DATE WHEN ALL
9 SALARIED AND WAGE-EARNING EMPLOYEES WILL BE REQUIRED TO UNDERGO CONTROLLED
10 SUBSTANCE OR ALCOHOL TESTS, OR BOTH.

11 (B) AN EMPLOYER MAY MANAGE OR CONTRACT WITH A THIRD PARTY TO ESTABLISH AND
12 ADMINISTER A RANDOM TESTING PROCESS THAT MUST INCLUDE:

13 (I) AN ESTABLISHED CALENDAR PERIOD FOR TESTING;

14 (II) AN ESTABLISHED TESTING RATE WITHIN THE CALENDAR PERIOD;

15 (III) A RANDOM SELECTION PROCESS THAT WILL DETERMINE WHO WILL BE TESTED ON ANY
16 GIVEN DATE DURING THE CALENDAR PERIOD FOR TESTING;

17 (IV) ALL SUPERVISORY AND MANAGERIAL EMPLOYEES IN THE RANDOM SELECTION AND
18 TESTING PROCESS; AND

19 (V) A PROCEDURE THAT REQUIRES THE EMPLOYER TO OBTAIN A SIGNED STATEMENT FROM
20 EACH EMPLOYEE THAT CONFIRMS THAT THE EMPLOYEE HAS RECEIVED A WRITTEN DESCRIPTION OF
21 THE RANDOM SELECTION PROCESS AND THAT REQUIRES THE EMPLOYER TO MAINTAIN THE
22 STATEMENT IN THE EMPLOYEE'S PERSONNEL FILE. THE SELECTION OF EMPLOYEES IN A RANDOM
23 TESTING PROCEDURE MUST BE MADE BY A SCIENTIFICALLY VALID METHOD, SUCH AS A RANDOM
24 NUMBER TABLE OR A COMPUTER-BASED RANDOM NUMBER GENERATOR TABLE.

25 (3) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO SUBMIT TO FOLLOWUP TESTS IF THE
26 EMPLOYER DETERMINES THAT THE EMPLOYEE HAS MISUSED CONTROLLED SUBSTANCES OR
27 ALCOHOL AT THE WORK SITE EMPLOYEE HAS HAD A VERIFIED POSITIVE TEST FOR A CONTROLLED
28 SUBSTANCE OR FOR ALCOHOL. THE FOLLOWUP TESTS MUST BE DESCRIBED IN THE EMPLOYER'S
29 CONTROLLED SUBSTANCE AND ALCOHOL POLICY AND MAY BE CONDUCTED FOR UP TO 1 YEAR FROM
30 THE TIME THAT THE EMPLOYER FIRST REQUIRES A FOLLOWUP TEST.

1 (4) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO BE TESTED FOR CONTROLLED
2 SUBSTANCES OR ALCOHOL IF THE EMPLOYER HAS REASON TO SUSPECT THAT AN EMPLOYEE'S
3 FACULTIES ARE IMPAIRED ON THE JOB AS A RESULT OF THE USE OF A CONTROLLED SUBSTANCE OR
4 ALCOHOL CONSUMPTION. AN EMPLOYER SHALL COMPLY WITH THE SUPERVISORY TRAINING
5 REQUIREMENT IN 49 CFR, PART 382.603, WHENEVER THE EMPLOYER REQUIRES A TEST ON THE BASIS
6 OF REASONABLE SUSPICION.

7 (5) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO BE TESTED FOR CONTROLLED
8 SUBSTANCES OR ALCOHOL IF THE EMPLOYER HAS REASON TO BELIEVE THAT THE EMPLOYEE MAY
9 HAVE CONTRIBUTED TO EMPLOYEE'S ACT OR FAILURE TO ACT IS A DIRECT OR PROXIMATE CAUSE
10 OF A WORK-RELATED ACCIDENT THAT HAS CAUSED DEATH OR PERSONAL INJURY OR PROPERTY
11 DAMAGE IN EXCESS OF \$1,500.

12
13 NEW SECTION. SECTION 5. EMPLOYEE'S RIGHT OF REBUTTAL. THE EMPLOYER SHALL PROVIDE
14 AN EMPLOYEE WHO HAS BEEN TESTED UNDER ANY QUALIFIED TESTING PROGRAM DESCRIBED IN
15 [SECTION 5 4] WITH A COPY OF THE TEST REPORT. THE EMPLOYER IS ALSO REQUIRED TO OBTAIN,
16 AT THE EMPLOYEE'S REQUEST AND AT THE EMPLOYEE'S EXPENSE, AN ADDITIONAL TEST OF THE
17 URINE SPLIT SAMPLE BY AN INDEPENDENT LABORATORY SELECTED BY THE PERSON TESTED. THE
18 EMPLOYER SHALL PAY FOR THE ADDITIONAL TESTS IF THE ADDITIONAL TEST RESULTS ARE
19 NEGATIVE, AND THE EMPLOYEE SHALL PAY FOR THE ADDITIONAL TESTS IF THE ADDITIONAL TEST
20 RESULTS ARE POSITIVE. THE EMPLOYEE MUST BE PROVIDED THE OPPORTUNITY TO REBUT OR
21 EXPLAIN THE RESULTS OF ANY TEST.

22
23 NEW SECTION. SECTION 6. LIMITATION ON ADVERSE ACTION. ADVERSE NO ADVERSE
24 ACTION, INCLUDING FOLLOWUP TESTING, MAY NOT BE TAKEN BY THE EMPLOYER IF THE EMPLOYEE
25 PRESENTS A REASONABLE EXPLANATION OR MEDICAL OPINION INDICATING THAT THE ORIGINAL TEST
26 RESULTS WERE NOT CAUSED BY ILLEGAL USE OF CONTROLLED SUBSTANCES OR BY ALCOHOL
27 CONSUMPTION. IF THE EMPLOYEE PRESENTS A REASONABLE EXPLANATION OR MEDICAL OPINION,
28 THE TEST RESULTS MUST BE REMOVED FROM THE EMPLOYEE'S RECORD AND DESTROYED.

29
30 NEW SECTION. Section 7. Confidentiality of results. (1) Except as provided in subsection (2) and

1 except for information that is required by law to be reported to a state or federal licensing authority, all
 2 information, interviews, reports, statements, memoranda, or test results received by an employer through
 3 a qualified testing program are confidential communications and may not be used or received in evidence,
 4 obtained in discovery, or disclosed in any public or private proceeding.

5 (2) Material that is confidential under subsection (1) may be used in a proceeding related to:

6 (a) legal action arising out of an employer's implementation of [sections 1 through ~~5-8~~ 7]; or

7 (b) inquiries relating to a workplace accident involving death, physical injury, or property damage
 8 in excess of \$1,500 when there is reason to believe that the tested employee may have caused or
 9 contributed to the accident.

10
 11 **Section 8.** Section 39-2-304, MCA, is amended to read:

12 "**39-2-304. Lie detector tests prohibited** ~~—regulation of blood and urine testing.~~ (1) A person, firm,
 13 corporation, or other business entity or its representative may not require:

14 ~~(a) as a condition for employment or continuation of employment, a person to take a polygraph test~~
 15 ~~or any form of a mechanical lie detector test;~~ as a condition for employment or continuation of employment.

16 ~~(b) as a condition for employment, a person to submit to a blood or urine test, except for~~
 17 ~~employment in:~~

18 ~~(i) hazardous work environments;~~

19 ~~(ii) jobs the primary responsibility of which is security, public safety, or fiduciary responsibility; or~~

20 ~~(iii) jobs involving the intrastate commercial transportation of persons or commodities by a~~
 21 ~~commercial motor carrier or an employee subject to driver qualification requirements; and~~

22 ~~(c) as a condition for continuation of employment, an employee to submit to a blood or urine test,~~
 23 ~~except when:~~

24 ~~(i) the employer has reason to believe that the employee's faculties are impaired on the job as a~~
 25 ~~result of alcohol consumption or illegal drug use;~~

26 ~~(ii) the employer has reason to believe that an employee may have contributed to a work-related~~
 27 ~~accident that causes death or personal injury or property damage in excess of \$1,500; or~~

28 ~~(iii) drug testing is being conducted at an employee's regular biennial physical for employment in~~
 29 ~~jobs involving the intrastate commercial motor carrier transportation of persons or commodities.~~

30 ~~(2) Prior to the administration of a drug or alcohol test, the person, firm, corporation, or other~~

1 ~~business entity or its representative shall adopt the written testing procedure that is provided in 49 CFR,~~
 2 ~~part 40, and make it available to all persons subject to testing.~~

3 ~~(3) The person, firm, corporation, or other business entity or its representative shall provide a copy~~
 4 ~~of drug or alcohol test results to the person tested and provide the person with the opportunity, at the~~
 5 ~~expense of the person requiring the test, to obtain a confirmatory test of the blood or urine by an~~
 6 ~~independent laboratory selected by the person tested. The person tested must be given the opportunity to~~
 7 ~~rebut or explain the results of either test or both tests. In the case of an accident referred to in subsection~~
 8 ~~(1)(c)(iii), the tests may not be delayed, but the person, firm, corporation, or other business entity or its~~
 9 ~~representative shall, as soon as possible, make a written finding as to whether the act or failure to act is~~
 10 ~~believed to be a direct or proximate cause of the accident and shall provide the tested employee with a~~
 11 ~~copy of the finding. The written record of a blood or urine test of an employee who is required to submit~~
 12 ~~to testing pursuant to subsection (1)(c)(iii) and whose acts or failure to act is subsequently found not to be~~
 13 ~~the direct or proximate cause of a work-related accident must be removed from the employee's work record~~
 14 ~~and be destroyed.~~

15 ~~(4) Adverse action may not be taken against a person tested under subsections (1)(b), (1)(c), (2),~~
 16 ~~and (3) if the person tested presents a reasonable explanation or medical opinion indicating that the results~~
 17 ~~of the test were not caused by alcohol consumption or illegal drug use.~~

18 ~~(5) A person who violates this section is guilty of a misdemeanor.~~

19 ~~(6) As used in this section:~~

20 ~~(a) "commercial motor carrier" has the meaning provided in 61-1-320 and in 69-12-101; and~~

21 ~~(b) "intra-state" means commerce or trade that is begun, carried on, and completed wholly in this~~
 22 ~~state."~~

23
 24 **NEW SECTION. Section 9. Codification instruction.** [Sections 1 through ~~5-8~~ 7] are intended to
 25 be codified as an integral part of Title 39, chapter 2, part 2, and the provisions of Title 39, chapter 2, part
 26 2, apply to [sections 1 through ~~5-8~~ 7].

27
 28 **NEW SECTION. SECTION 10. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID**
 29 **PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT]**
 30 **IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID**

1 APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

2 -END-



CONFERENCE COMMITTEE

on House Bill 345
Report No. 2, April 16, 1997

Mr. Speaker and Mr. President:

We, your Conference Committee met and considered **House Bill 345** (reference copy -- salmon) and recommend that **House Bill 345** be amended as follows:

- 1. Page 2, lines 9 through 12.
Strike: subsection (7) in its entirety
Renumber: subsequent subsections
- 2. Page 3, lines 13 through 15.
Following: "PART 40" on line 13
Strike: the remainder of line 13 through "(8)" on line 15
- 3. Page 5, lines 24 through 30.
Strike: subsection (8) in its entirety

And this Conference Committee report be adopted.

For the House:

Raymond Masolo
Representative Masolo, Chair

Charles R. Devaney
Representative Devaney

Jim Ellingson
Representative Ellingson

For the Senate:

Senator Keating
Senator Keating, Chair

Bill Wilson
Senator Wilson

Fred Thomas
Senator Thomas

ADOPT

REJECT

CCR #2

AC HB 345-2

811602CC.Hgd

HB 345



FREE CONFERENCE COMMITTEE

on House Bill 345

Report No. 1, April 16, 1997

Page 1 of 1


Mr. Speaker and Mr. President:


We, your Free Conference Committee met and considered **House Bill 345** (reference copy -- salmon) and recommend that **House Bill 345** be amended as follows:


1. Page 3, line 11.
Following: "all employees"
Strike: "and prospective employees"

And this FREE Conference Committee report be adopted.

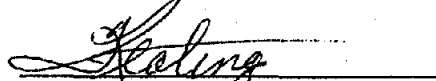
For the House:

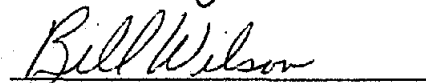

Representative Masolo, Chair



Representative Devaney


Representative Eljingson

For the Senate:


Senator Keating, Chair


Senator Wilson


Senator Thomas

ADOPT

REJECT

AC HB 345-1

811128CC.Hgd



FREE CONFERENCE COMMITTEE

on House Bill 345

Report No. 1, April 16, 1997

Page 1 of 1

Mr. Speaker and Mr. President:

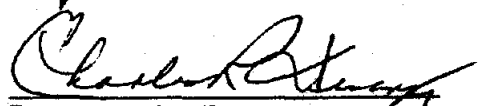
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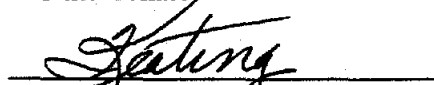
For the House:

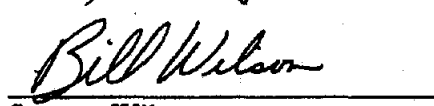

Representative Masolo, Chair

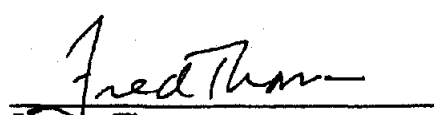

Representative Devaney


Representative Ellingson

For the Senate:


Senator Keating, Chair


Senator Wilson


Senator Thomas

ADOPT

REJECT

FCCR #1

AC HB 345-1

811128CC.Hgd

HB 345

HOUSE BILL NO. 345

INTRODUCED BY MASOLO

A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE ~~PRIVATE~~ WORKFORCE DRUG AND ALCOHOL TESTING ACT; ESTABLISHING CRITERIA FOR DRUG AND ALCOHOL TESTING OF EMPLOYEES AND PROSPECTIVE EMPLOYEES; ~~LIMITING THE LIABILITY OF EMPLOYERS USING QUALIFIED DRUG AND ALCOHOL 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 ~~5-8~~ 7] may be cited as the "~~Private Workforce~~ WORKFORCE Drug and Alcohol Testing Act".

NEW SECTION. Section 2. Definitions. As used in [sections 1 through ~~5-8~~ 7], the following definitions apply:

(1) "ALCOHOL" MEANS AN INTOXICATING AGENT IN ALCOHOLIC BEVERAGES, ETHYL ALCOHOL, ALSO CALLED ETHANOL, OR THE HYDRATED OXIDE OF ETHYL.

(2) "ALCOHOL CONCENTRATION" MEANS THE ALCOHOL IN A VOLUME OF BREATH EXPRESSED IN TERMS OF GRAMS OF ALCOHOL PER 210 LITERS OF BREATH, AS INDICATED BY AN EVIDENTIAL BREATH TEST.

~~{1}~~(3) "Controlled substance" means a dangerous drug, as defined as ~~50-32-101~~, and listed in ~~Schedules I or II in 50-32-222 and 50-32-224~~ IN 49 CFR, PART 40, except a drug used pursuant to a valid prescription or as authorized by law.

~~{2}~~(4) "Employee" means an individual engaged in the performance, SUPERVISION, OR MANAGEMENT of work IN A HAZARDOUS WORK ENVIRONMENT, SECURITY POSITION, POSITION AFFECTING PUBLIC SAFETY, OR FIDUCIARY POSITION for a ~~private~~ AN employer and does not include an independent contractor. THE TERM INCLUDES AN ELECTED OFFICIAL.

~~{3}~~(5) "Employer" means a person or entity ~~in the private sector~~ that has one or more employees and that is located in or doing business in Montana.



- 1 (6) "HAZARDOUS WORK ENVIRONMENT" INCLUDES BUT IS NOT LIMITED TO POSITIONS:
 2 (A) FOR WHICH DRUG CONTROLLED SUBSTANCE AND ALCOHOL TESTING IS MANDATED BY
 3 FEDERAL LAW, SUCH AS AVIATION, INTERSTATE COMMERCIAL MOTOR CARRIER, RAILROAD,
 4 PIPELINE, AND COMMERCIAL MARINE EMPLOYEES;
 5 (B) THAT INVOLVE THE OPERATION OF OR WORK IN PROXIMITY TO CONSTRUCTION
 6 EQUIPMENT, INDUSTRIAL MACHINERY, OR MINING ACTIVITIES; OR
 7 (C) THAT INVOLVE HANDLING OR PROXIMITY TO FLAMMABLE MATERIALS, EXPLOSIVES,
 8 TOXIC CHEMICALS, OR SIMILAR SUBSTANCES.

9 ~~(7) "INITIAL TEST" MEANS SCIENTIFICALLY ACCEPTED ANALYTICAL METHODS AND~~
 10 ~~PROCEDURES THAT HAVE BEEN CLEARED BY THE FEDERAL FOOD AND DRUG ADMINISTRATION FOR~~
 11 ~~COMMERCIAL DISTRIBUTION. SPECIMEN COLLECTION AND CHAIN OF CUSTODY PROCEDURES FOR~~
 12 ~~AN INITIAL TEST MUST CONFORM TO 49 CFR, PART 40.~~

13 ~~(4)(6)(7)(8)(7)~~ "Medical review officer" means a ~~state-licensed~~ LICENSED physician trained in the
 14 field of substance abuse.

15 ~~(5)(7)(8)(9)(8)~~ "Prospective employee" means an individual who has made a written or oral
 16 application to an employer to become an employee.

17 ~~(6)(8)(9)(10)(9)~~ "Qualified testing program" means a program to test for the presence of controlled
 18 substances and alcohol that meets the criteria set forth in [sections 4 3 and 5 4].

19 ~~(7)(9)(10)(11)(10)~~ "Sample" means a urine ~~or blood~~ specimen to determine the presence of a
 20 controlled substance or a breath alcohol test to determine the presence of alcohol.

21

22 ~~NEW SECTION. Section 3. Limitations on employer liability. (1) An employer is not liable for~~
 23 ~~monetary damages arising out of a drug or alcohol test that the employer requires an employee or~~
 24 ~~prospective employee to take if the test is administered pursuant to a qualified testing program that is~~
 25 ~~adopted and implemented by an employer to test employees for the presence of controlled substances or~~
 26 ~~alcohol, unless:~~

27 ~~(a) the employer took disciplinary action against the employee based on a false test result and the~~
 28 ~~employer's reliance on the test result was not reasonable or was in bad faith. There is a rebuttable~~
 29 ~~presumption that an employer's reliance on a test result is reasonable if the employer complies with the~~
 30 ~~provisions of [sections 4 and 5 THROUGH 8] and rules adopted pursuant to [sections 4 and 5 THROUGH~~

1 ~~8).~~

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

4 ~~(2) An employer is not liable for monetary damages arising out of a drug or alcohol test that fails~~
5 ~~to detect a specific controlled substance or other substance, disease, infectious agent, virus, or physical~~
6 ~~abnormality, problem, or defect of any kind.~~

7

8 NEW SECTION. Section 3. Qualified testing program. A qualified testing program must comply
9 with the following criteria:

10 (1) Testing must be conducted according to the terms of written policies and procedures that must
11 be adopted by the employer and must be available for review by all employees ~~and prospective employees~~
12 ~~60 days before implementation.~~ THE TERMS ARE IMPLEMENTED OR CHANGED. CONTROLLED
13 SUBSTANCE AND ALCOHOL TESTING PROCEDURES MUST CONFORM TO 49 CFR, PART 40, EXCEPT
14 AN INITIAL TEST FOR A CONTROLLED SUBSTANCE OR ALCOHOL MAY BE USED AS PROVIDED IN
15 SUBSECTION (8). At a minimum, the policies and procedures must require:

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

18 (b) the employer's ~~proposal~~ PROGRAM for REGULARLY educating or providing information to
19 employees on the health AND WORKPLACE SAFETY risks associated with the use of controlled substances
20 and alcohol;

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

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

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

28 (f) ~~a statement that employees may be tested, including a discussion~~ DESCRIPTION of the
29 ~~circumstances that may trigger an immediate test~~ IDENTIFICATION OF THE TYPES OF CONTROLLED
30 SUBSTANCE AND ALCOHOL TESTS TO BE USED FROM THE TYPES OF TESTS LISTED IN [SECTION 4];

1 (g) a list of controlled substances for which the employer intends to test AND A STATED
 2 ALCOHOL CONCENTRATION LEVEL ABOVE WHICH A TESTED EMPLOYEE MUST BE SANCTIONED;

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

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

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

9 (i) the tested employee;

10 (ii) ~~employees or agents of the employer who are specifically authorized by the tested employee~~
 11 ~~to resolve~~ RECEIVE the employee's test results THE DESIGNATED REPRESENTATIVE OF THE EMPLOYER;
 12 or

13 (iii) ~~in a proceeding related to a legal action~~ IN CONNECTION WITH ANY LEGAL OR
 14 ADMINISTRATIVE CLAIM arising out of the employer's implementation of [sections 1 through ~~5-8~~ 7] or in
 15 response to inquiries relating to a workplace accident involving death, physical injury, or property damage
 16 in excess of \$1,500, when there is reason to believe that the tested employee may have caused or
 17 contributed to the accident; and

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

21 (2) In addition to imposing appropriate sanctions on an employee for violation of the employer's
 22 standards of conduct, an employer may require an employee who tests positive on a test for controlled
 23 substances or alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation
 24 program as a condition of continued employment. An employer may require the employee to submit to
 25 periodic ~~retesting~~ FOLLOWUP TESTING as a condition of the counseling, treatment, or rehabilitation
 26 program.

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

29 (4) The collection of TRANSPORT, AND CONFIRMATION TESTING OF URINE samples must be
 30 performed IN ~~in a manner designed to protect the privacy of the employee, using, when practicable, screens~~

1 or stalls, except that if an employer has reason to believe an employee may adulterate or substitute the
2 required sample, the employer may require that the sample be provided under the direct supervision of
3 testing personnel.

4 ~~(5) Samples must be handled under strict forensic chain of custody procedures. The procedures~~
5 ~~must require that a sample be collected, stored, and transported in a manner that documents and preserves~~
6 ~~the identity of each sample and prevents the adulteration, contamination, or erroneous identification of test~~
7 ~~results.~~

8 ~~(6) Testing of samples must be performed according to scientifically accepted analytical procedures~~
9 ~~by a qualified laboratory certified by the national institute on drug abuse. Confirmatory tests of an initial~~
10 ~~screening test must be conducted by the same laboratory using gas chromatography-mass spectrometry~~
11 ~~techniques or techniques that are of comparable or superior quality with respect to validation~~
12 ACCORDANCE WITH 49 CFR, PART 40.

13 ~~(7)(5)~~ Before an employer may take any action based on a positive test result, the employer shall
14 have the results reviewed and certified by a medical review officer who is trained in the field of substance
15 abuse. An employee or prospective employee must be given the opportunity to provide notification to the
16 medical review officer of any medical information that is relevant to interpreting test results, including
17 information concerning currently or recently used prescription or nonprescription drugs.

18 (6) BREATH ALCOHOL TESTS MUST BE ADMINISTERED BY A CERTIFIED BREATH ALCOHOL
19 TECHNICIAN AND MAY ONLY BE CONDUCTED USING TESTING EQUIPMENT THAT APPEARS ON THE
20 LIST OF CONFORMING PRODUCTS PUBLISHED IN THE FEDERAL REGISTER.

21 (7) A BREATH ALCOHOL TEST RESULT MUST INDICATE AN ALCOHOL CONCENTRATION OF
22 GREATER THAN 0.04 FOR A PERSON TO BE CONSIDERED AS HAVING ALCOHOL IN THE PERSON'S
23 BODY.

24 ~~(8) AN EMPLOYER MAY USE AN INITIAL TEST TO SCREEN AN EMPLOYEE OR PROSPECTIVE~~
25 ~~EMPLOYEE FOR THE USE OF A CONTROLLED SUBSTANCE OR ALCOHOL. IF THE INITIAL TEST RESULTS~~
26 ~~INDICATE A POTENTIAL POSITIVE, THE INITIAL TEST MUST BE CONFIRMED. CONFIRMATION TESTS~~
27 ~~MUST BE COMPLETED USING COLLECTION, TRANSPORTING, AND TESTING PROCEDURES THAT~~
28 ~~CONFORM TO 49 CFR, PART 40. ONLY CONFIRMED TEST RESULTS MAY BE USED TO DETERMINE IF~~
29 ~~AN EMPLOYEE TESTS POSITIVE FOR A CONTROLLED SUBSTANCE OR ALCOHOL. ONLY CONFIRMED~~
30 ~~POSITIVE OR NEGATIVE TEST RESULTS MAY BE ENTERED INTO AN EMPLOYEE'S PERSONNEL FILE.~~

1 NEW SECTION. SECTION 4. QUALIFIED TESTING PROGRAM -- ALLOWABLE TYPES --
2 PROCEDURES. EACH OF THE FOLLOWING ACTIVITIES IS PERMISSIBLE IN THE IMPLEMENTATION OF A
3 QUALIFIED TESTING PROGRAM:

4 (1) AN EMPLOYER MAY TEST ANY ~~NEWLY HIRED~~ PROSPECTIVE EMPLOYEE AS A CONDITION
5 OF HIRE WITHIN 6 DAYS OF THE EMPLOYEE'S REPORTING TO WORK.

6 (2) AN EMPLOYER MAY USE RANDOM TESTING IF THE EMPLOYER'S CONTROLLED SUBSTANCE
7 AND ALCOHOL POLICY INCLUDES ONE OR BOTH OF THE FOLLOWING PROCEDURES:

8 (A) AN EMPLOYER OR AN EMPLOYER'S REPRESENTATIVE MAY ESTABLISH A DATE WHEN ALL
9 SALARIED AND WAGE-EARNING EMPLOYEES WILL BE REQUIRED TO UNDERGO CONTROLLED
10 SUBSTANCE OR ALCOHOL TESTS, OR BOTH.

11 (B) AN EMPLOYER MAY MANAGE OR CONTRACT WITH A THIRD PARTY TO ESTABLISH AND
12 ADMINISTER A RANDOM TESTING PROCESS THAT MUST INCLUDE:

13 (I) AN ESTABLISHED CALENDAR PERIOD FOR TESTING;
14 (II) AN ESTABLISHED TESTING RATE WITHIN THE CALENDAR PERIOD;
15 (III) A RANDOM SELECTION PROCESS THAT WILL DETERMINE WHO WILL BE TESTED ON ANY
16 GIVEN DATE DURING THE CALENDAR PERIOD FOR TESTING;

17 (IV) ALL SUPERVISORY AND MANAGERIAL EMPLOYEES IN THE RANDOM SELECTION AND
18 TESTING PROCESS; AND

19 (V) A PROCEDURE THAT REQUIRES THE EMPLOYER TO OBTAIN A SIGNED STATEMENT FROM
20 EACH EMPLOYEE THAT CONFIRMS THAT THE EMPLOYEE HAS RECEIVED A WRITTEN DESCRIPTION OF
21 THE RANDOM SELECTION PROCESS AND THAT REQUIRES THE EMPLOYER TO MAINTAIN THE
22 STATEMENT IN THE EMPLOYEE'S PERSONNEL FILE. THE SELECTION OF EMPLOYEES IN A RANDOM
23 TESTING PROCEDURE MUST BE MADE BY A SCIENTIFICALLY VALID METHOD, SUCH AS A RANDOM
24 NUMBER TABLE OR A COMPUTER-BASED RANDOM NUMBER GENERATOR TABLE.

25 (3) AN EMPLOYER MAY REQUIRE AN EMPLOYEE TO SUBMIT TO FOLLOWUP TESTS IF THE
26 EMPLOYER DETERMINES THAT THE EMPLOYEE HAS MISUSED CONTROLLED SUBSTANCES OR
27 ALCOHOL AT THE WORK SITE EMPLOYEE HAS HAD A VERIFIED POSITIVE TEST FOR A CONTROLLED
28 SUBSTANCE OR FOR ALCOHOL. THE FOLLOWUP TESTS MUST BE DESCRIBED IN THE EMPLOYER'S
29 CONTROLLED SUBSTANCE AND ALCOHOL POLICY AND MAY BE CONDUCTED FOR UP TO 1 YEAR FROM
30 THE TIME THAT THE EMPLOYER FIRST REQUIRES A FOLLOWUP TEST.

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3 FACULTIES ARE IMPAIRED ON THE JOB AS A RESULT OF THE USE OF A CONTROLLED SUBSTANCE OR
4 ALCOHOL CONSUMPTION. AN EMPLOYER SHALL COMPLY WITH THE SUPERVISORY TRAINING
5 REQUIREMENT IN 49 CFR, PART 382.603, WHENEVER THE EMPLOYER REQUIRES A TEST ON THE BASIS
6 OF REASONABLE SUSPICION.

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8 SUBSTANCES OR ALCOHOL IF THE EMPLOYER HAS REASON TO BELIEVE THAT THE ~~EMPLOYEE MAY~~
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16 AT THE EMPLOYEE'S REQUEST AND AT THE EMPLOYEE'S EXPENSE, AN ADDITIONAL TEST OF THE
17 URINE SPLIT SAMPLE BY AN INDEPENDENT LABORATORY SELECTED BY THE PERSON TESTED. THE
18 EMPLOYER SHALL PAY FOR THE ADDITIONAL TESTS IF THE ADDITIONAL TEST RESULTS ARE
19 NEGATIVE, AND THE EMPLOYEE SHALL PAY FOR THE ADDITIONAL TESTS IF THE ADDITIONAL TEST
20 RESULTS ARE POSITIVE. THE EMPLOYEE MUST BE PROVIDED THE OPPORTUNITY TO REBUT OR
21 EXPLAIN THE RESULTS OF ANY TEST.

22
23 NEW SECTION. SECTION 6. LIMITATION ON ADVERSE ACTION. ADVERSE NO ADVERSE
24 ACTION, INCLUDING FOLLOWUP TESTING, MAY NOT BE TAKEN BY THE EMPLOYER IF THE EMPLOYEE
25 PRESENTS A REASONABLE EXPLANATION OR MEDICAL OPINION INDICATING THAT THE ORIGINAL TEST
26 RESULTS WERE NOT CAUSED BY ILLEGAL USE OF CONTROLLED SUBSTANCES OR BY ALCOHOL
27 CONSUMPTION. IF THE EMPLOYEE PRESENTS A REASONABLE EXPLANATION OR MEDICAL OPINION,
28 THE TEST RESULTS MUST BE REMOVED FROM THE EMPLOYEE'S RECORD AND DESTROYED.

29
30 NEW SECTION. Section 7. Confidentiality of results. (1) Except as provided in subsection (2) and

1 except for information that is required by law to be reported to a state or federal licensing authority, all
 2 information, interviews, reports, statements, memoranda, or test results received by an employer through
 3 a qualified testing program are confidential communications and may not be used or received in evidence,
 4 obtained in discovery, or disclosed in any public or private proceeding.

5 (2) Material that is confidential under subsection (1) may be used in a proceeding related to:

6 (a) legal action arising out of an employer's implementation of [sections 1 through ~~5-8~~ 7]; or

7 (b) inquiries relating to a workplace accident involving death, physical injury, or property damage
 8 in excess of \$1,500 when there is reason to believe that the tested employee may have caused or
 9 contributed to the accident.

10

11 **Section 8.** Section 39-2-304, MCA, is amended to read:

12 **"39-2-304. Lie detector tests prohibited —~~regulation of blood and urine testing.~~** (1) A person, firm,
 13 corporation, or other business entity or its representative may not require:

14 ~~(a) as a condition for employment or continuation of employment, a person to take a polygraph test~~
 15 ~~or any form of a mechanical lie detector test; as a condition for employment or continuation of employment.~~

16 ~~(b) as a condition for employment, a person to submit to a blood or urine test, except for~~
 17 ~~employment in:~~

18 ~~(i) hazardous work environments;~~

19 ~~(ii) jobs the primary responsibility of which is security, public safety, or fiduciary responsibility; or~~

20 ~~(iii) jobs involving the intrastate commercial transportation of persons or commodities by a~~
 21 ~~commercial motor carrier or an employee subject to driver qualification requirements; and~~

22 ~~(c) as a condition for continuation of employment, an employee to submit to a blood or urine test,~~
 23 ~~except when:~~

24 ~~(i) the employer has reason to believe that the employee's faculties are impaired on the job as a~~
 25 ~~result of alcohol consumption or illegal drug use;~~

26 ~~(ii) the employer has reason to believe that an employee may have contributed to a work-related~~
 27 ~~accident that causes death or personal injury or property damage in excess of \$1,500; or~~

28 ~~(iii) drug testing is being conducted at an employee's regular biennial physical for employment in~~
 29 ~~jobs involving the intrastate commercial motor carrier transportation of persons or commodities.~~

30 (2) ~~Prior to the administration of a drug or alcohol test, the person, firm, corporation, or other~~

1 ~~business entity or its representative shall adopt the written testing procedure that is provided in 49 CFR,~~
 2 ~~part 40, and make it available to all persons subject to testing.~~

3 ~~(3) The person, firm, corporation, or other business entity or its representative shall provide a copy~~
 4 ~~of drug or alcohol test results to the person tested and provide the person with the opportunity, at the~~
 5 ~~expense of the person requiring the test, to obtain a confirmatory test of the blood or urine by an~~
 6 ~~independent laboratory selected by the person tested. The person tested must be given the opportunity to~~
 7 ~~rebut or explain the results of either test or both tests. In the case of an accident referred to in subsection~~
 8 ~~(1)(c)(iii), the tests may not be delayed, but the person, firm, corporation, or other business entity or its~~
 9 ~~representative shall, as soon as possible, make a written finding as to whether the act or failure to act is~~
 10 ~~believed to be a direct or proximate cause of the accident and shall provide the tested employee with a~~
 11 ~~copy of the finding. The written record of a blood or urine test of an employee who is required to submit~~
 12 ~~to testing pursuant to subsection (1)(c)(iii) and whose act or failure to act is subsequently found not to be~~
 13 ~~the direct or proximate cause of a work-related accident must be removed from the employee's work record~~
 14 ~~and be destroyed.~~

15 ~~(4) Adverse action may not be taken against a person tested under subsections (1)(b), (1)(c), (2),~~
 16 ~~and (3) if the person tested presents a reasonable explanation or medical opinion indicating that the results~~
 17 ~~of the test were not caused by alcohol consumption or illegal drug use.~~

18 ~~(5) A person who violates this section is guilty of a misdemeanor.~~

19 ~~(6) As used in this section:~~

20 ~~(a) "commercial motor carrier" has the meaning provided in 61-1-320 and in 69-12-101; and~~

21 ~~(b) "intra-state" means commerce or trade that is begun, carried on, and completed wholly in this~~
 22 ~~state."~~

23
 24 **NEW SECTION. Section 9. Codification instruction.** [Sections 1 through ~~5-8~~ 7] are intended to
 25 be codified as an integral part of Title 39, chapter 2, part 2, and the provisions of Title 39, chapter 2, part
 26 2, apply to [sections 1 through ~~5-8~~ 7].

27
 28 **NEW SECTION. SECTION 10. SEVERABILITY. IF A PART OF [THIS ACT] IS INVALID, ALL VALID**
 29 **PARTS THAT ARE SEVERABLE FROM THE INVALID PART REMAIN IN EFFECT. IF A PART OF [THIS ACT]**
 30 **IS INVALID IN ONE OR MORE OF ITS APPLICATIONS, THE PART REMAINS IN EFFECT IN ALL VALID**

1 APPLICATIONS THAT ARE SEVERABLE FROM THE INVALID APPLICATIONS.

2 -END-