

SENATE CS FOR CS FOR HOUSE BILL NO. 207(L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Offered: 5/8/97

Referred: Rules

Sponsor(s): REPRESENTATIVES GREEN, Rokeberg, Porter

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to employer drug and alcohol testing programs."

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 * **Section 1.** AS 23.10 is amended by adding new sections to read:

4 **Article 9. Drug and Alcohol Testing by Employers.**

5 **Sec. 23.10.600. Employer protection from litigation.** (a) If an employer has
6 established a drug and alcohol testing policy and initiated a testing program under
7 AS 23.10.600 - 23.10.699, a person may not bring an action for damages against the
8 employer for

9 (1) actions in good faith based on the results of a positive drug test or
10 alcohol impairment test;

11 (2) failure to test for drugs or alcohol impairment or failure to test for
12 a specific drug or another controlled substance;

13 (3) failure to test or, if tested, failure to detect a specific drug or other
14 substance, a medical condition, or a mental, emotional, or psychological disorder or
15 condition; or

(4) termination or suspension of a drug or alcohol prevention or testing program or policy.

(b) A person may not bring an action for damages based on test results against an employer who has established and implemented a drug and alcohol testing program under AS 23.10.600 - 23.10.699 unless the employer's action was based on a false positive test result and the employer knew or clearly should have known that the result was in error and ignored the true test result because of reckless or malicious disregard for the truth or the wilful intent to deceive or be deceived.

(c) In a claim, including a claim under AS 23.10.600 - 23.10.699, if it is alleged that an employer's action was based on a false positive test result,

(1) there is a rebuttable presumption that the test result was valid if the employer complied with the provisions of AS 23.10.600 - 23.10.699; and

(2) the employer is not liable for monetary damages if the employer's reliance on a false positive test result was reasonable and in good faith.

(d) A person may not bring an action for damages against an employer for an action taken related to a false negative drug test or alcohol impairment test.

(e) A person may not bring an action against an employer based on failure of the employer to establish a program or policy on substance abuse prevention or to implement drug testing or alcohol impairment testing.

Sec. 23.10.610. Limits on causes of action for disclosures. A person may not bring an action for defamation of character, libel, slander, or damage to reputation against an employer who has established a program of drug testing or alcohol impairment testing under AS 23.10.600 - 23.10.699 if the action is based on drug or alcohol testing unless

(1) the results of the test were disclosed to a person other than the employer, an authorized employee, agent or representative of the employer, the tested employee, the tested prospective employee, or another person authorized or privileged by law to receive the information;

- (2) the information disclosed was a false positive test result;
- (3) the false positive test result was disclosed negligently; and
- (4) all elements of an action for defamation of character, libel, slander,

1 or damage to reputation as established by law are satisfied.

2 **Sec. 23.10.615. Employer's compliance voluntary.** Compliance with
3 AS 23.10.600 - 23.10.699 by employers is voluntary.

4 **Sec. 23.10.620. Employer policy.** (a) Under AS 23.10.600 - 23.10.699, an
5 employer may only carry out the testing or retesting for the presence or evidence of
6 use of drugs or alcohol after adopting a written policy for the testing and retesting and
7 informing employees of the policy. The employer may inform employees by
8 distributing a copy of the policy to each employee subject to testing or making the
9 policy available to employees in the same manner as the employer informs its
10 employees of other personnel practices, including inclusion in a personnel handbook
11 or manual or posting in a place accessible to employees. The employer shall inform
12 prospective employees that they must undergo drug testing.

13 (b) The written policy on drug and alcohol testing must include, at a minimum,

14 (1) a statement of the employer's policy respecting drug and alcohol
15 use by employees;

16 (2) a description of those employees or prospective employees who are
17 subject to testing;

18 (3) the circumstances under which testing may be required;

19 (4) the substances as to which testing may be required;

20 (5) a description of the testing methods and collection procedures to be
21 used, including an employee's right to a confirmatory drug test to be reviewed by a
22 licensed physician or doctor of osteopathy after an initial positive drug test result in
23 accordance with AS 23.10.640(d);

24 (6) the consequences of a refusal to participate in the testing;

25 (7) any adverse personnel action that may be taken based on the testing
26 procedure or results;

27 (8) the right of an employee, on the employee's request, to obtain the
28 written test results and the obligation of the employer to provide written test results
29 to the employee within five working days after a written request to do so, so long as
30 the written request is made within six months after the date of the test;

31 (9) the right of an employee, on the employee's request, to explain in

1 a confidential setting, a positive test result; if the employee requests in writing an
2 opportunity to explain the positive test result within 10 working days after the
3 employee is notified of the test result, the employer must provide an opportunity, in
4 a confidential setting, within 72 hours after receiving the employee's written notice,
5 or before taking adverse employment action;

6 (10) a statement of the employer's policy regarding the confidentiality
7 of the test results.

8 (c) An employer may require the collection and testing of a sample of an
9 employee's or prospective employee's urine or breath for any job-related purpose
10 consistent with business necessity and the terms of the employer's policy, including

11 (1) investigation of possible individual employee impairment;

12 (2) investigation of accidents in the workplace; an employee may be
13 required to undergo drug testing or alcohol impairment testing for an accident if the
14 test is taken as soon as practicable after an accident and the test is administered to
15 employees who the employer reasonably believes may have contributed to the accident;

16 (3) maintenance of safety for employees, customers, clients, or the
17 public at large;

18 (4) maintenance of productivity, the quality of products or services, or
19 security of property or information;

20 (5) reasonable suspicion that an employee may be affected by the use
21 of drugs or alcohol and that the use may adversely affect the job performance or the
22 work environment.

23 (d) In addition to tests required under (c) of this section, an employer may
24 require employees or groups of employees to undergo drug testing on a random or
25 chance basis.

26 (e) If an employer institutes a policy of drug testing or alcohol impairment
27 testing under AS 23.10.600 - 23.10.699, the policy must identify which employees or
28 positions are subject to testing. An employer must test all or part of the work force
29 based on consideration of safety for employees, customers, clients, or the public at
30 large. An employer may not initiate a testing program under AS 23.10.600 - 23.10.699
31 until at least 30 days after the employer notifies employees of the employer's intent

1 to implement the program and makes written copies of the policy available as required
2 by (a) of this section.

3 (f) The provisions of AS 23.10.600 - 23.10.699 may not be construed to
4 discourage, restrict, limit, prohibit, or require on-site drug testing or alcohol
5 impairment testing.

6 **Sec. 23.10.630. Collection of samples.** (a) An employer may test an
7 employee for the presence of drugs or for alcohol impairment. An employer may test
8 a prospective employee for the presence of drugs.

9 (b) In order to test reliably, an employer may require an employee or
10 prospective employee to provide a sample of the individual's urine or breath and to
11 present reliable individual identification to the person collecting the sample. Collection
12 of the sample must conform to the requirements of AS 23.10.600 - 23.10.699. The
13 employer may designate the type of sample to be used for testing.

14 (c) An employer shall normally schedule a drug test or an alcohol impairment
15 test of employees during, or immediately before or after, a regular work period.
16 Alcohol impairment or drug testing required by an employer is considered to be work
17 time for the purposes of compensation and benefits for current employees. Sample
18 collection shall be performed in a manner that guarantees the individual's privacy to
19 the maximum extent consistent with ensuring that the sample is not contaminated,
20 adulterated, or misidentified.

21 (d) An employer shall pay the entire actual costs for drug testing and alcohol
22 impairment testing required of employees and prospective employees. An employer
23 shall also pay reasonable transportation costs to an employee if the required test is
24 conducted at a location other than the employee's normal work site.

25 **Sec. 23.10.640. Testing procedures.** (a) Sample collection and testing for
26 alcohol impairment and drugs under AS 23.10.600 - 23.10.699 shall be performed
27 under reasonable and sanitary conditions. The person collecting samples shall
28 document the sample, including labeling the sample to preclude to the extent
29 reasonable the possibility of misidentification of the person tested in relation to the test
30 result provided, and shall provide the person to be tested with an opportunity to
31 provide medical information that may be relevant to the test, including identifying

1 current or recently used prescription and nonprescription drugs.

2 (b) Sample collection, storage, and transportation to the place of testing shall
3 be performed in a manner reasonably designed to preclude the possibility of sample
4 contamination, adulteration, or misidentification.

5 (c) Sample testing must comply with scientifically accepted analytical methods
6 and procedures. Except for on-site testing under AS 23.10.645, drug testing shall be
7 conducted at a laboratory approved or certified by the Substance Abuse and Mental
8 Health Services Administration or the College of American Pathologists, American
9 Association of Clinical Chemists.

10 (d) Drug testing, including on-site drug testing, must include confirmation of
11 a positive drug test result. The confirmation must be by use of a different analytical
12 process than was used in the initial drug screen. The second or confirmatory drug test
13 shall be a gas chromatography mass spectrometry. An employer may not rely on a
14 positive drug test unless the confirmatory drug test results have been reviewed by a
15 licensed physician or doctor of osteopathy. The physician or osteopath shall

16 (1) contact the employee within 48 hours and offer an opportunity to
17 discuss the confirming test result;

18 (2) interpret and evaluate the positive drug test results for legal use; and

19 (3) report test results that have been caused by prescription medication
20 as negative.

21 (e) A drug test conducted under this section or in an on-site test under
22 AS 23.10.645 for a drug for which the United States Department of Health and Human
23 Services has established a cutoff level shall be considered to have yielded a positive
24 result if the test establishes the presence of the drug at levels equal to or greater than
25 that cutoff level. For a drug for which the United States Department of Health and
26 Human Services has not established a cutoff level, the employer shall, in the written
27 policy under AS 23.10.620, inform employees of the cutoff level that the employer
28 will use to establish the presence of the drug.

29 **Sec. 23.10.645. On-site testing.** (a) An employer may include on-site drug
30 and alcohol tests of employees and prospective employees as part of the employer's
31 drug and alcohol testing policy under AS 23.10.600 - 23.10.699. In on-site testing

1 under this section, an employer may only use products approved by the Food and Drug
2 Administration for employee testing and shall use the products in accordance with the
3 manufacturer's instructions. On-site testing under this section may only be conducted
4 by a test administrator who is certified under AS 23.10.650(b).

5 (b) In on-site testing under this section, the specimen to be tested must be kept
6 in sight of the employee or applicant who is the subject of the test. The test
7 administrator shall

8 (1) conduct the test in a manner that allows the subject of the test to
9 observe the testing procedure and the results; in the case of a sight-impaired employee,
10 the employee may request the presence of an observer; however, the test administrator
11 is not required to delay collection of the sample or administration of the test because
12 of the sight-impaired employee's request;

13 (2) complete the sample documentation required under
14 AS 23.10.640(a);

15 (3) prepare a written record of the results of the on-site test.

16 (c) An employer may not take permanent employment action against an
17 employee based on an unconfirmed, screen, positive on-site test result. If an employer
18 takes temporary adverse employment action based on an on-site test result, the
19 employer shall restore the employee's wages and benefits if the confirmatory test result
20 is negative or if the employee demonstrates that the positive test result was caused by
21 drugs taken in accordance with a valid prescription of the employee or by lawful
22 nonprescription drugs.

23 **Sec. 23.10.650. Training of test administrators.** (a) Each employer shall
24 ensure that at least one designated employee receives at least 60 minutes of training
25 on alcohol misuse and at least an additional 60 minutes of training on the use of
26 controlled substances. The training will be used by the designee to determine whether
27 reasonable suspicion exists to require an employee to undergo testing under
28 AS 23.10.630.

29 (b) If an employer administers on-site drug or alcohol tests to test employees
30 or prospective employees under AS 23.10.645, the employer shall ensure that each
31 person who will be administering the on-site test receives training and meets the

1 qualifications of this subsection. An on-site test administrator must

2 (1) have been trained by the manufacturer of the test or the
3 manufacturer's representative on the proper procedure for administering the test and
4 accurate evaluation of on-site test results; training must be conducted in person by a
5 trainer from the manufacturer or the manufacturer's representative;

6 (2) be certified in writing by the manufacturer or the manufacturer's
7 representative as competent to administer and evaluate the on-site test;

8 (3) have been trained to recognize adulteration of a sample to be used
9 in on-site testing; and

10 (4) sign a statement that clearly states that the on-site test administrator
11 will hold all information related to any phase of a drug test confidential.

12 **Sec. 23.10.655. Disciplinary procedures.** (a) An employer may take adverse
13 employment action based on

14 (1) a positive drug test or alcohol impairment test result that indicates
15 a violation of the employer's written policy;

16 (2) the refusal of an employee or prospective employee to provide a
17 drug testing sample; or

18 (3) the refusal of an employee to provide an alcohol impairment testing
19 sample.

20 (b) Adverse employment action under (a) of this section may include

21 (1) a requirement that the employee enroll in an employer provided or
22 employer approved rehabilitation, treatment, or counseling program; the program may
23 include additional drug testing and alcohol impairment testing; the employer may
24 require participation in the program as a condition of employment; costs of
25 participating in the program may or may not be covered by the employer's health plan
26 or policies;

27 (2) suspension of the employee, with or without pay, for a designated
28 period of time;

29 (3) termination of employment;

30 (4) in case of drug testing, refusal to hire a prospective employee; and

31 (5) other adverse employment action.

Sec. 23.10.660. Confidentiality of results; access to records. A communication received by an employer relevant to drug test or alcohol impairment test results and received through the employer's testing program is a confidential and privileged communication and may not be disclosed except

(1) to the tested employee or prospective employee or another person designated in writing by the employee or prospective employee;

(2) to individuals designated by an employer to receive and evaluate test results or hear the explanation of the employee or prospective employee; or

(3) as ordered by a court or governmental agency.

Sec. 23.10.670. Effect of mandatory testing obligations. An employer who is obligated by state or federal requirements to have a drug testing or alcohol impairment testing policy or program shall receive the full benefits of AS 23.10.600 - 23.10.699 even if the required policy or program is not consistent with AS 23.10.600 - 23.10.699, so long as the employer complies with the state or federal requirements applicable to the employer's operations.

Sec. 23.10.699. Definitions. In AS 23.10.600 - 23.10.699,

(1) "alcohol" means ethanol, isopropanol, or methanol;

(2) "drugs" means a substance considered unlawful under AS 11.71 or the metabolite of the substance;

(3) "drug testing" means testing for evidence of the use of a drug;

(4) "employee" means a person in the service of an employer;

(5) "employer" means a person who employs one or more full-time employees under a contract of hire, express or implied, oral or written;

(6) "good faith" means reasonable reliance on fact, or that which is held out to be factual, without the intent to deceive or be deceived and without reckless or malicious disregard for the truth;

(7) "prospective employee" means a person who has made application to an employer, whether written or oral, to become an employee;

(8) "random" means a scientifically valid method that ensures that all covered employees have an equal chance of being selected;

(9) "sample" means urine or breath from the person being tested.