

HOUSE BILL NO. 207

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE GREEN

Introduced: 3/21/97

Referred: Labor and Commerce, Judiciary

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

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

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

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

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

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

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

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

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

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

28 (2) the information disclosed was a false positive test result;

29 (3) the false positive test result was disclosed negligently; and

30 (4) all elements of an action for defamation of character, libel, slander,
31 or damage to reputation as established by law are satisfied.

1 **Sec. 23.10.615. Employer's compliance voluntary.** Compliance with
2 AS 23.10.600 - 23.10.699 by employers is voluntary. A person may not bring an
3 action for damages against an employer because the employer has a drug testing and
4 alcohol impairment testing policy that is not in compliance with AS 23.10.600 -
5 23.10.699.

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

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

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

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

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

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

22 (5) a description of the testing methods and collection procedures to be
23 used;

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;

29 (9) the right of an employee, on the employee's request, to explain in
30 a confidential setting, a positive test result;

31 (10) a statement of the employer's policy regarding the confidentiality

1 of the test results.

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

5 (1) investigation of possible individual employee impairment;

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

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

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

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

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

20 (e) If an employer institutes a policy of drug testing or alcohol impairment
21 testing under AS 23.10.600 - 23.10.699, the policy must identify which employees or
22 positions are subject to testing. An employer must test all or part of the work force
23 based on consideration of safety for employees, customers, clients, or the public at
24 large.

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

28 **Sec. 23.10.630. Collection of samples.** (a) An employer may require an
29 employee to undergo a test for the presence of drugs or for alcohol impairment. An
30 employer may require a prospective employee to undergo a test for the presence of
31 drugs.

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

6 (c) An employer shall normally schedule a drug test or an alcohol impairment
7 test of employees during, or immediately before or after, a regular work period.
8 Alcohol impairment or drug testing required by an employer is considered to be work
9 time for the purposes of compensation and benefits for current employees.

10 (d) An employer shall pay the entire actual costs for drug testing and alcohol
11 impairment testing required of employees. An employer shall also pay reasonable
12 transportation costs to an employee if the required test is conducted at a location other
13 than the employee's normal work site. An employer is not required to pay the costs
14 of drug testing of prospective employees.

15 **Sec. 23.10.640. Testing procedures.** (a) Sample collection and testing for
16 alcohol impairment and drugs under AS 23.10.600 - 23.10.699 shall be performed
17 under reasonable and sanitary conditions. The person collecting samples shall
18 document the sample, including labeling the sample to preclude to the extent
19 reasonable the possibility of misidentification of the person tested in relation to the test
20 result provided, and shall provide the person to be tested with an opportunity to
21 provide medical information that may be relevant to the test, including identifying
22 current or recently used prescription and nonprescription drugs.

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

26 (c) Sample testing must comply with scientifically accepted analytical methods
27 and procedures. Drug testing shall be conducted at a laboratory approved or certified
28 by the United States Department of Health and Human Services or the College of
29 American Pathologists.

30 (d) For employees, drug testing must include confirmation of a positive drug
31 test result. The confirmation must be by use of a different chemical process than was

1 used in the initial drug screen. The second or confirmatory drug test shall be a
2 chromatography mass spectrometry.

3 **Sec. 23.10.650. Disciplinary procedures.** (a) An employer may take adverse
4 employment action based on

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

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

9 (3) the refusal of an employee to provide an alcohol impairment testing
10 sample.

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

12 (1) a requirement that the employee enroll in an employer provided or
13 employer approved rehabilitation, treatment, or counseling program; the program may
14 include additional drug testing and alcohol impairment testing; the employer may
15 require participation in the program as a condition of employment; costs of
16 participating in the program may or may not be covered by the employer's health plan
17 or policies;

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

20 (3) termination of employment;

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

22 (5) other adverse employment action.

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

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

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

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

1 **Sec. 23.10.670. Collective bargaining.** An employer who complies with the
2 provisions of a drug testing or alcohol impairment testing policy negotiated with the
3 collective bargaining representative of the employer's employees or consistent with the
4 terms of a collective bargaining agreement shall receive the full benefits of
5 AS 23.10.600 - 23.10.699 even if the policy is not consistent with AS 23.10.600 -
6 23.10.699.

7 **Sec. 23.10.680. Effect of mandatory testing obligations.** An employer who
8 is obligated by state or federal requirements to have a drug testing or alcohol
9 impairment testing policy or program shall receive the full benefits of AS 23.10.600 -
10 23.10.699 even if the required policy or program is not consistent with AS 23.10.600 -
11 23.10.699, so long as the employer complies with the state or federal requirements
12 applicable to the employer's operations.

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

- 14 (1) "alcohol" means ethanol, isopropanol, or methanol;
15 (2) "drugs" means a substance considered unlawful under AS 11.71 or
16 the metabolite of the substance;
17 (3) "drug testing" means testing for evidence of the use of a drug;
18 (4) "employee" means a person in the service of an employer;
19 (5) "employer" means a person who employs one or more full-time
20 employees under a contract of hire, express or implied, oral or written;
21 (6) "good faith" means reasonable reliance on fact, or that which is held
22 out to be factual, without the intent to deceive or be deceived and without reckless or
23 malicious disregard for the truth;
24 (7) "prospective employee" means a person who has made application
25 to an employer, whether written or oral, to become an employee;
26 (8) "random" means a scientifically valid method that ensures that all
27 covered employees have an equal chance of being selected;
28 (9) "sample" means urine or breath from the person being tested.