

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

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Offered: 4/9/97

Referred: Judiciary

Sponsor(s): REPRESENTATIVE GREEN

**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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 (1) investigation of possible individual employee impairment;

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

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

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

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

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

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

1 by (a) of this section.

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

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

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

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

30 (b) Sample collection, storage, and transportation to the place of testing shall  
31 be performed in a manner reasonably designed to preclude the possibility of sample

1 contamination, adulteration, or misidentification.

2 (c) Sample testing must comply with scientifically accepted analytical methods  
3 and procedures. Drug testing shall be conducted at a laboratory approved or certified  
4 by the Substance Abuse and Mental Health Services Administration, the College of  
5 American Pathologists, or the American Association of Clinical Chemists.

6 (d) For employees, drug testing must include confirmation of a positive drug  
7 test result. The confirmation must be by use of a different analytical process than was  
8 used in the initial drug screen. The second or confirmatory drug test shall be a gas  
9 chromatography mass spectrometry. An employer may not rely on a positive drug test  
10 unless the confirmatory drug test results have been reviewed by a licensed physician  
11 or doctor of osteopathy. The physician or osteopath shall

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

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

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

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

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

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

23 (3) the refusal of an employee to provide an alcohol impairment testing  
24 sample.

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

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

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

3 (3) termination of employment;

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

5 (5) other adverse employment action.

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

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

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

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

15 **Sec. 23.10.670. Effect of mandatory testing obligations.** An employer who  
16 is obligated by state or federal requirements to have a drug testing or alcohol  
17 impairment testing policy or program shall receive the full benefits of AS 23.10.600 -  
18 23.10.699 even if the required policy or program is not consistent with AS 23.10.600 -  
19 23.10.699, so long as the employer complies with the state or federal requirements  
20 applicable to the employer's operations.

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

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

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

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

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

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

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

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

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

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