

**CS FOR HOUSE BILL NO. 207(JUD)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 4/14/97

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

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 if the action is based on drug or  
24 alcohol testing unless

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

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

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

31 (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 of a written request to do so, provided the  
30 written request is made within six months of 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 of receiving the employee's written notice, or  
5 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. Each employer shall ensure that at least one designated person  
3 receives at least 60 minutes of training on alcohol misuse and at least an additional 60  
4 minutes of training on the use of controlled substances. The training will be used by  
5 the designee to determine whether reasonable suspicion exists to require an employee  
6 to undergo testing under AS 23.10.630.

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

10 **Sec. 23.10.630. Collection of samples.** (a) An employer may require an  
11 employee to undergo a test for the presence of drugs or for alcohol impairment. An  
12 employer may require a prospective employee to undergo a test for the presence of  
13 drugs.

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

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

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

30 **Sec. 23.10.640. Testing procedures.** (a) Sample collection and testing for  
31 alcohol impairment and drugs under AS 23.10.600 - 23.10.699 shall be performed

1 under reasonable and sanitary conditions. The person collecting samples shall  
2 document the sample, including labeling the sample to preclude to the extent  
3 reasonable the possibility of misidentification of the person tested in relation to the test  
4 result provided, and shall provide the person to be tested with an opportunity to  
5 provide medical information that may be relevant to the test, including identifying  
6 current or recently used prescription and nonprescription drugs.

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

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

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

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

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

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

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

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

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

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

7                   (3) the refusal of an employee to provide an alcohol impairment testing  
8 sample.

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

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

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

18                   (3) termination of employment;

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

20                   (5) other adverse employment action.

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

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

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

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

30           **Sec. 23.10.670. Effect of mandatory testing obligations.** An employer who  
31 is obligated by state or federal requirements to have a drug testing or alcohol

1 impairment testing policy or program shall receive the full benefits of AS 23.10.600 -  
2 23.10.699 even if the required policy or program is not consistent with AS 23.10.600 -  
3 23.10.699, so long as the employer complies with the state or federal requirements  
4 applicable to the employer's operations.

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

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

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

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

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

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

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

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

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

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