

**HOUSE . . . . . No. 1807**

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**The Commonwealth of Massachusetts**

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**In the Year Two Thousand Nine**  
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An Act to prevent private employers and state government to require drug testing as a condition of employment, work of any nature, within Commonwealth of Massachusetts Republic..

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 Notice

2 (a) The commissioner of labor shall develop and distribute to each employer a standard  
3 notice as provided in this section. Each notice shall be in clear and understandable language and  
4 shall include:

5 (1) a summary of this subchapter;

6 (2) that an employee, in order to receive the protections of this subchapter, must report,  
7 pursuant to law the employer, to the supervisor, or to the person designated to receive  
8 notifications; and other

9 (3) a space for the name, title, and contact information of the person to whom the  
10 employee must make a report

11 (b) No later than January 01 2010 each employer shall post the notice in the employer's  
12 place of business to inform the employees of their protections and obligations under this

13 subchapter. The employer shall post the notice in a prominent and accessible location in the  
14 workplace. The employer shall indicate on the notice the name or title of the individual the  
15 employer has designated to receive notifications pursuant to this law

16 (c) An employer who violates this section by not posting the notice as required is liable  
17 for a civil fine of \$500.00 for each day of willful violation.

## 18 Definitions

19 As used in this subchapter:

20 (1) "Applicant for employment" means an individual seeking or being sought for  
21 employment with an employer.

22 (2) "Designated laboratory" means a laboratory designated by the department of health

23 (3) "Drug" means a drug listed or classified by the U.S. Drug Enforcement  
24 Administration as a Schedule I drug, or its metabolites, and alcohol. It shall also mean other  
25 drugs or their metabolites which are must be shown to cause impairment of the individual on the  
26 job, which are: amitriptyline, amphetamines, barbiturates, benzodiazepines, cocaine, doxepin,  
27 glutethimide, hydromorphone, imipramine, meperidine, methadone, methaqualone, opiates,  
28 oxycodone, pentazocine, phenytoin, phencyclidine, phenothiazines, and propoxyphene. In  
29 addition, the commissioner of health may Not add drugs to this list not recognized .

30 (4) "Drug test" means the procedure of taking and analyzing body fluids or materials  
31 from the body for the purpose of detecting the presence of a regulated drug as defined under  
32 MGL a drug as defined

33 (5) "Employee" means any person who may be permitted, required or directed by any  
34 employer, in consideration of direct or indirect gain or profit, to perform services.

35 (6) "Employer" means any individual, organization, or governmental body including  
36 partnership, association, trustee, estate, corporation, joint stock company, insurance company or  
37 legal representative, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee  
38 or successor thereof, and any common carrier by mail, motor, water, air or express company  
39 doing business in or operating within this state, which has one or more individuals performing  
40 services for it within this state, or which has offered or may offer employment to one or more  
41 individuals.

42 (7) "Employment agency" means a person who undertakes, with or without  
43 compensation, to procure, refer, recruit or place for an employer or person, the opportunity to  
44 work for an employer.

45 (8) "Collector" means an individual certified by a United States Health and Human  
46 Services approved collector certification program for each type of specimen to be collected. A  
47 "collector" shall be recertified every three years and may not be an employee of the employer for  
48 the purposes of performing a drug test based on probable cause.

49 Drug testing of applicants; prohibitions; exceptions

50 (a) General prohibition. Except as provided in subsection (b) of this section, an employer  
51 or an employment agency shall not, as a condition of employment, do any of the following:

52 (1) Request or require that an applicant for employment take or submit to a drug test.

53 (2) Administer or attempt to administer a drug test to an applicant for employment.

54 (3) Request or require that an applicant for employment consent, directly or indirectly, to  
55 a practice prohibited under this subchapter.

56 (b) Exception. An employer may require an applicant for employment to submit to a drug  
57 test only if all of the following conditions are met:

58 (1) Conditional offer of employment. The applicant has been given an offer of  
59 employment conditioned on the applicant receiving a negative test result.

60 (2) Notice. The applicant received written notice of the drug testing procedure and a list  
61 of the drugs to be tested. The notice shall also state that therapeutic levels of medically-  
62 prescribed drugs tested will not be reported. The notice required under this subdivision may not  
63 be waived by the applicant.

64 (3) Administration. The drug test is administered in accordance with MGL section of  
65 this title.

66 Drug testing of employees; prohibitions; exceptions

67 (a) General prohibition. Except as provided in subsection (c) of this section, an employer  
68 shall not, as a condition of employment, promotion or change of status of employment, or as an  
69 expressed or implied condition of a benefit or privilege of employment, do any of the following:

70 (1) Request or require that an employee take or submit to a drug test.

71 (2) Administer or attempt to administer a drug test to an employee.

72 (3) Request or require that an employee consent, directly or indirectly, to a practice  
73 prohibited under this subchapter.

74 (b) Random or company-wide tests. An employer shall not request, require or conduct  
75 random or company-wide drug tests except when such testing is required by federal law or  
76 regulation.

77 (c) Exception. Notwithstanding the prohibition in subsection (a) of this section, an  
78 employer may require an individual employee to submit to a drug test if all the following  
79 conditions are met:

80 (1) Probable cause. The employer or an agent of the employer has probable cause to  
81 believe the employee is using or is under the influence of a drug on the job The employer or  
82 agent thereof must file a sign affidavit and make such a perminet employee record .sign and  
83 witness descibing the acts , Time , place, and one copy shall be given to employee and one for  
84 employer as matter of record

85 (2) Employee assistance program. The employer has available for the employee tested a  
86 bona fide rehabilitation program for alcohol or drug abuse and such program is provided by the  
87 employer or is available to the extent provided by a policy of health insurance or under contract  
88 by a nonprofit hospital service corporation.

89 (3) Employee may not be terminated. The employee may not be terminated if the test  
90 result is positive and the employee agrees to participate in and then successfully completes the  
91 employee assistance program; however, the employee may be suspended only for the period of  
92 time necessary to complete the program, but in no event longer than three months. The employee  
93 may be terminated if, after completion of an employee assistance program, the employer  
94 subsequently administers a drug test in compliance with subdivisions (1) and (4) of this  
95 subsection and the test result is positive.

96 (4) Administration of test. The drug test is administered in accordance with MGL

97 Administration of tests

98 An employer may request an applicant for employment or an employee to submit to a  
99 drug test pursuant to this subchapter, provided the drug testing is performed in compliance with  
100 all the following requirements:

101 (1) Drugs to be tested. The test shall be administered only to detect the presence of  
102 alcohol or drugs, as defined in subdivision 511(3) of this title, at nontherapeutic levels.

103 (2) Written policy. The employer shall provide all persons tested with a written policy  
104 that identifies the circumstances under which persons may be required to submit to drug tests, the  
105 particular test procedures, the drugs that will be screened, a statement that over-the-counter  
106 medications and other substances may result in a positive test and the consequences of a positive  
107 test result. The employer's policy shall incorporate all provisions of this section.

108 (3) Blood samples. An employer may not request or require that a blood sample be drawn  
109 for the purpose of administering a drug test.

110 (4) Designated laboratory. The employer shall use only a laboratory designated by the  
111 department of health.

112 (5) Chain of custody. The collector shall establish a chain of custody procedure for both  
113 sample collection and testing that will assure the anonymity of the individual being tested and  
114 verify the identity of each sample and test result.

115 (6) Urinalysis procedure. If a urinalysis procedure is used to screen for drugs, the  
116 employer shall:

117 (A) require the laboratory performing the test to confirm any sample that tests positive by  
118 testing the sample by gas chromatography with mass spectrometry or an equivalent scientifically  
119 accepted method that provides quantitative data about the detected drug or drug metabolites; and

120 (B) provide the person tested with an opportunity, at his or her request and expense, to  
121 have a blood sample drawn at the time the urine sample is provided, and preserved in such a way  
122 that it can be tested later for the presence of drugs.

123 (7) Laboratory reports. A laboratory may report that a urine sample is positive only if  
124 both the initial test and confirmation test are positive for the particular drug. Test results shall  
125 only be provided by written report in accordance with subdivision (9) of this section.

126 (8) Negative test results. The detection of a drug at a therapeutic level as defined by the  
127 commissioner of health shall be reported as a negative test result. The laboratory's report shall  
128 not contain any information indicating the presence of a drug at a therapeutic level as defined by  
129 the commissioner.

130 (9) Information to be supplied. The laboratory shall provide the medical review officer  
131 with a written report of the drug test result. The medical review officer shall review the report,  
132 and discuss the results and options available with the individual tested. The written report shall  
133 include all of the following information:

134 (A) The unique identifier code of the person tested.

135 (B) The type of test conducted for both initial screening and confirmation.

136 (C) The results of each test.

137 (D) The detection level, meaning the cut-off or measure used to distinguish positive and  
138 negative samples, on both the initial screening and confirmation procedures.

139 (E) The name and address of the laboratory.

140 (F) Any other information provided by the laboratory concerning that person's test.

141 (10) Preservation of samples. The collector shall ensure that a portion of any positive  
142 sample is preserved in a condition that will permit accurate retesting for a period of not less than  
143 90 days after the person tested receives the result.

144 (11) Medical review officer. The employer shall contract with or employ a certified  
145 medical review officer who shall be a licensed physician with knowledge of the medical use of  
146 prescription drugs and the pharmacology and toxicology of illicit drugs. The medical review  
147 officer shall review and evaluate all drug test results, assure compliance with this section of this  
148 drug testing law , report the results of all tests to the individual tested, and report only confirmed  
149 drug test results to the employer.

150 (12) Collector. The employer shall designate a collector to collect specimens from job  
151 applicants and employees. The collector may be an employee for the purposes of collecting  
152 specimens from job applicants. The collector may not be an employee for the purposes of  
153 collecting specimens from employees for drug testing based on probable cause.

154 Positive test results; opportunity to retest

155 (a) A medical review officer shall contact personally an employee , applicant who has a  
156 positive test result and explain the results and why the results may not be accurate. and allow  
157 testing by blood at that said time



158 (b) The medical review officer shall provide any applicant or employee who has a  
159 positive test result with an opportunity to retest a portion of the sample at an independent  
160 laboratory at the expense of the person tested and shall consider the results of the retest. or a  
161 blood test shall be allowed by option of the applicant or employee , not by employer

162 Confidentiality

163 (a) Any health care information about an individual to be tested shall be taken only by a  
164 medical review officer and shall be confidential and shall not be released to anyone except the  
165 individual tested, and may not be obtained by court order or process, except as provided in this  
166 subchapter in relation to any problem to cause suit by the employee or other

167 (b) Employers, medical review officers, laboratories and their agents, who receive or  
168 have access to information about drug test results, shall keep all information confidential.  
169 Release of such information under any other circumstance shall be solely pursuant to a written  
170 consent form signed voluntarily by the person tested, except where such release is compelled by  
171 a court of competent jurisdiction in connection with an action brought under this subchapter. A  
172 medical review officer shall not reveal the identity of an individual being tested to any person,  
173 including the laboratory.

174 (c) If information about drug test results is released contrary to the provisions of this  
175 subchapter, it shall be inadmissible as evidence in any judicial or quasi-judicial proceeding,  
176 except in a court of competent jurisdiction in connection with an action brought under this  
177 subchapter

178 Designated laboratory; rule making authority of the commissioner

179 (a) The department of health shall designate laboratories to test body fluids or materials  
180 for drugs. Such laboratories must be able to document competency in regard to personnel, quality  
181 assurance programs, methodology and equipment, on site confirmation of positive screening  
182 tests, security, confidentiality and expert testimony.

183 (b) A laboratory that fails to comply with the provisions of this subchapter relating to the  
184 confirmation and reporting of test information and the release of confidential information shall  
185 lose its designation under this subsection.

186 (c) The commissioner of health shall adopt rules pursuant to this law and too  
187 establishing nontherapeutic levels of therapeutic drugs by establishing a range of values  
188 considering average medical use for each particular drug or metabolite authorized to be tested  
189 under this subchapter. The levels must come to show and would give proof of on the job  
190 impairment

#### 191 Enforcement

192 (a) Private right of action. is protect , An applicant or employee aggrieved by a violation  
193 of this subchapter may bring a civil action for injunctive relief, damages, court costs and  
194 attorney's fees.

195 (b) Burden of proof. In a private right of action alleging that an employer has violated  
196 this subchapter, the employer has the burden of proving that the requirements of of said sections  
197 of this Law have been satisfied. In any civil action alleging that a laboratory has violated the  
198 reporting or confidentiality sections of this subchapter, the laboratory shall have the burden of  
199 proving that the requirements of sections confidentiality of this law have been satisfied.

200 (c) State action to obtain civil penalty. A person who violates any provision of this this  
201 law shall be subject to a civil penalty of not less than \$500.00 nor more than \$2,500.00.

202 (d) State action to obtain criminal penalty. A person who knowingly violates any  
203 provision of this law shall be fined not less than \$500.00 nor more than \$2,500.00 or shall be  
204 imprisoned not more than 12 months, or both.

205 Transitory provisions

206 (a) the commissioner of health pursuant to set nontherapeutic levels of therapeutic drugs  
207 by establishing a range of values by considering average medical use for each particular drug or  
208 metabolite authorized to be tested under this subchapter.

209 (b) , the test shall be administered to detect the presence of alcohol or drugs as defined in  
210 subdivision this law insofar as they apply to testing only for nontherapeutic levels shall take  
211 effect when the law is enacted

212 (c) if an applicant receives a positive test result and has a valid predated prescription for  
213 the drug tested, the positive test result may not in and of itself be sufficient reason for not hiring  
214 an applicant., if an employee receives a positive test result and has a valid predated prescription  
215 for the drug tested, the positive test result may not in and of itself be sufficient reason for  
216 requiring that the employee participate in an employee assistance program or for disciplining or  
217 dismissing the employee.

218 (d) The commissioner of health on or before January 1 ,2010 shall issue a progress report  
219 to the house and senate committees on general affairs on the ability of the commissioner to  
220 comply with subsection (a) of this section.