



State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-1714/1

GMM:kmg:jf

Fr. 9/5

RMR

2003 BILL

Gen. Cat.

1 AN ACT to create 16.855 (9m), 66.0901 (10), 84.06 (2) (c) and 103.503 of the
2 statutes, relating to: drug and alcohol testing of employees who are required
3 to be paid the prevailing wage rate for work performed on projects of public
4 works ~~and granting rule-making authority.~~

requires any person that bids

Analysis by the Legislative Reference Bureau

Under current law, subject to certain exceptions, all laborers, workers, mechanics, and truck drivers employed on a state or local public works project whose estimated cost of completion is \$37,000 or more for a single-trade public works project or \$180,000 or more for a multiple-trade public works project must be paid at the rate paid for a majority of the hours worked in the person's trade or occupation in the county in which the project is located (prevailing wage law).

to submit

This bill ~~prohibits a person from bidding~~ for a contract to perform work on a public works project that is subject to the prevailing wage law (project) ~~unless the person submits~~ with the bid a statement that the person, and all subcontractors and agents that will be performing work on the project, (employer) have in place, or will have in place before any work on the project commences, a drug and alcohol testing program that complies with the bill.

negative

Under the bill, an employer may not permit a laborer, worker, mechanic, or truck driver who is covered under the prevailing wage law (employee) to work on a project unless the employee has ~~been~~ tested for the presence of drugs or alcohol in the employee's system not more than 12 months preceding the date on which the employee commences work on the project or unless during those 12 months the

Program.

The bill permits an employer to contract with a third-party administrator to administer the employer's drug and alcohol testing program.

BILL

not less than 20 percent of the employees employed on the project

life of the project

employee has been participating in a random testing program under which the employee was tested at the commencement of the employee's participation in the program. After an employee begins work on a project, the employee must submit to reasonable suspicion testing, which is testing conducted based on a reasonable belief of the employer that the employee is using or has used drugs or alcohol in violation of the employer's policy, follow-up testing, which is testing conducted as a follow-up to the employee's participation in an employee assistance program for problems relating to drugs or alcohol or a drug or alcohol rehabilitation program as a condition of continued employment, and random testing, which is testing conducted randomly on a percentage of the employer's employees according to objective, neutral, and nondiscriminatory criteria and spread out throughout the year so that on any given day any given employee has an equal chance of being tested. The bill defines a "drug" as any controlled substance, controlled substance analog, prescription drug, or nonprescription drug that the Department of Workforce Development (DWD) determines by rule is subject to testing under the bill. The bill also requires DWD to define by rule the minimum alcohol concentration that is considered to be a positive test result.

11

employer

or third-party administrator

requires, at a minimum, that employees be tested for amphetamines, cocaine, marijuana, opiates, phenylhydrazine, and alcohol, and specifies the minimum detection levels that constitute a positive test result

The bill requires an employer, before testing an employee or a person who has been offered a position contingent on passing a test (applicant), to provide the employee or applicant with a written policy statement that is required under the bill to include certain information, including all of the following:

consequences

- 1. A general statement of the employer's policy concerning drug or alcohol use, which statement must include the circumstances under which an employee or applicant may be required to submit to testing and the actions that the employer may take with respect to a refusal to submit to testing or a positive, confirmed test result that has been verified by a licensed physician who has knowledge of substance abuse disorders, laboratory testing procedures, and chain-of-custody procedures and who has the necessary medical training to interpret and evaluate a positive test result, a person's medical history, and any other relevant biomedical information (medical review officer).
- 2. A statement that the testing is required as a condition of performing work on a project.
- 3. A list of the drugs for which testing is required.
- 4. A description of the procedures under which the testing is conducted and the employee protections specified in the bill.
- 5. A list of the most common medications that may alter or affect a test.
- 6. A statement concerning the confidentiality of information relating to a test as provided in the bill. Specifically, the bill provides that information relating to a test result is confidential and may be disclosed only on the specific written consent of the employee or applicant or on the order of a court, hearing examiner, arbitrator, or other decision maker for purposes of a proceeding arising out of an adverse employment action taken as a result of the test. The bill further provides that information relating to a test result may not be used against an employee or applicant in any criminal or civil proceeding, except by the employer in a proceeding arising out of an adverse employment action taken as a result of the test.

of a verified

confirmed

which is defined in the bill as an initial positive test result that has been confirmed by a second test and

test

second

BILL

request a retest of a specimen that has tested positive by ~~and~~ a laboratory chosen by the employee or applicant at the expense of the employee or applicant

7. The names, addresses, and telephone numbers of employee assistance programs and local drug and alcohol rehabilitation programs at which the employee may voluntarily seek treatment.

8. A statement that the employee or applicant may challenge or explain a positive, confirmed test result to the medical review officer and may provide information to the employer challenging a positive, confirmed test result or explaining why the test result does not constitute a violation of the employer's policy.

9. A statement that the employee or applicant may consult the testing laboratory for technical information regarding any prescription or nonprescription drugs that the employee or applicant ~~may be taking~~.

The bill affords certain protections to an employee or applicant who is required to be tested under the bill. Specifically, under the bill:

1. An employee or applicant must be given the opportunity to provide, both before and after a test, information that is relevant to the test, including identification of any prescription or nonprescription drugs that the employee or applicant is taking and any other relevant medical information.

2. The employer must inform an employee or applicant of a positive, confirmed test result ~~that has been verified by a medical review officer~~, the consequences of the test result, and the options available to the employee or applicant, within ~~five working days~~ after the employer receives the test result; the employee or applicant may submit information to the employer challenging the test result or explaining why the test result does not constitute a violation of the employer's policy within five working days after receiving notice of the test result from the employer; and the employer must inform the employee or applicant as to whether the challenge or explanation is satisfactory, and, if unsatisfactory, why the challenge or explanation is unsatisfactory, within 20 working days after the employer receives the challenge or explanation from the employee or applicant.

3. An employee may not be discharged, disciplined, or otherwise discriminated against solely on the basis of voluntarily seeking treatment for a problem relating to drug or alcohol use, if the employee has not previously tested positive for drug or alcohol use, entered an employee assistance program for problems relating to drug or alcohol use, or entered a drug or alcohol rehabilitation program, and an employee or applicant may not be discharged, disciplined, or otherwise discriminated against based solely on a positive test result that has not been verified by a confirmation test ~~and~~ by a medical review officer.

4. In the case of reasonable-suspicion testing, the employer must provide the employee with documentation of the circumstances on which the reasonable suspicion is based.

5. A test must be conducted immediately before, during, or immediately after work and at the employer's expense, except that any additional testing requested by the employee or applicant, but not required by the employer, is at the expense of the employee or applicant. The bill also provides that testing under the bill is considered to be performed during work time for purposes of determining wages, benefits, and hours of employment.

if the testing is conducted during an employee's regular work hours the employee shall be paid for the time lost from work at the employee's regular rate of pay, plus benefits, and if the testing is conducted outside those hours the employee shall be paid for the time necessary to take the test at the employee's regular rate of pay, excluding benefits.

Confirmed

is currently using or has recently used and any other relevant medical information

or third-party administrator

one working day

an initial

subject to reimbursement by the employer if the result of the retest or additional test is negative

regular rate of pay, plus benefits, and if the testing is conducted outside those hours the employee shall be paid for the time necessary to take the test at the employee's regular rate of pay, excluding benefits

both before and after the test, may provide any information that is relevant to the test, including identification of

within five working days after receiving that notice request a retest of a specimen that tested positive by a laboratory chosen by the employee or applicant at the expense of the employee or applicant

retesting fee

expense of the employee or applicant

BILL

verified

Similarly, the bill affords certain protections to an employer that is required to conduct drug or alcohol testing under the bill. Specifically, under the bill:

1. An employee or applicant who has a ~~positive, confirmed test result that has been verified by a medical review officer~~ is not considered to be an individual with a disability for purposes of the law prohibiting discrimination in employment on the basis of disability.

~~2. An employer that discharges or disciplines an employee, or that refuses to hire an applicant, based on a positive, confirmed test result that has been verified by a medical review officer or based on a refusal of the employee or applicant to be tested is considered to have done so for cause.~~

2.

3. An employer is not prohibited from establishing and enforcing reasonable work rules relating the use, possession, distribution, or delivery of drugs or alcohol in the workplace.

a third-party administrator,

~~4. An employer is not prohibited from conducting a medical screen, with the consent of an employee, to determine the employee's level of exposure to a potentially toxic chemical or substance in the workplace.~~

3.

5. A physician-patient relationship is not created between an employee or applicant and the employer, a medical review officer, or any other person conducting or evaluating a test under the bill.

~~Finally, the bill requires DWD to promulgate rules under which the testing required under the bill is to be conducted. The bill requires those rules to include a list of the drugs for which testing is required and, for each of those drugs, the minimum detection level that is considered to be a positive test result; the minimum alcohol concentration that is considered to be a positive test result; protocols governing the testing process from collection of the specimens to be tested to reporting of the results to the employer, chain-of-custody procedures to ensure the integrity of a specimen collected from an employee or applicant and to ensure reliable and accurate test results; and procedures under which an employee or applicant may challenge or explain a positive, confirmed test result to the medical review officer and employer.~~

Insert
A

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

shall require a bidder

1 SECTION 1. 16.855 (9m) of the statutes is created to read:

2 16.855 (9m) ~~(a)~~ The department ~~may not receive a bid~~ for a contract to perform

3 construction work on a project of public works that is subject to s. 103.49 ~~unless the~~

4 ~~bidder submits~~ with the bid a statement that the bidder, and all subcontractors and

5 agents that will be performing work on the project, have in place, or will have in place

to submit

BILL

this subsection

1 before any work on the project commences, a drug and alcohol testing program that
 2 complies with s. 103.503 ~~and the rules promulgated under s. 103.503 (9)~~
 3 (no A) ~~the~~ A statement specified under par. (a) shall be submitted on a form that is
 4 adopted and furnished by the department ~~and shall be filed in the manner and place~~
 5 designated by the department ~~of workforce development~~

SECTION 2. 66.0901 (10) of the statutes is created to read:

6
 7 **66.0901 (10) DRUG AND ALCOHOL TESTING REQUIREMENTS.** (a) A municipality ~~may~~
 8 ~~not receive a bid~~ ~~for a public contract that is subject to s. 66.0903 unless the bidder~~
 9 ~~submit~~ with the bid a statement that the bidder, and all subcontractors and agents
 10 that will be performing work under the public contract, have in place, or will have
 11 in place before any work under the public contract commences, a drug and alcohol
 12 testing program that complies with s. 103.503 ~~and the rules promulgated under s.~~
 13 ~~103.503 (9).~~

this subsection

14 (no A) ~~the~~ A statement specified under par. (a) shall be submitted on a form that is
 15 adopted and furnished by the municipality, ~~and shall be filed in the manner and place~~
 16 designated by the municipality ~~department of workforce development~~

SECTION 3. 84.06 (2) (c) of the statutes is created to read:

shall require a bidder

17
 18 **84.06 (2) (c)** ~~A~~ The department or an agent under par. (b) ~~may not receive a bid~~
 19 for a contract to perform construction work on a project of highway improvements
 20 that is subject to s. 103.50 ~~unless the bidder submit~~ ~~with the bid a statement that~~
 21 the bidder, and all subcontractors and agents that will be performing work on the
 22 project, have in place, or will have in place before any work on the project commences,
 23 a drug and alcohol testing program that complies with s. 103.503 ~~and the rules~~
 24 ~~promulgated under s. 103.503 (9).~~

to submit

BILL

This paragraph

1 (no P) ~~1~~ A statement specified under sub. 1 shall be submitted on a form that is
2 adopted and furnished by the department, ~~and shall be filed in the manner and place~~
3 ~~designated by the department~~ of workforce development

4 SECTION 4. 103.503 of the statutes is created to read:

5 **103.503 Drug-free public works projects.** (1) DEFINITIONS. In this section:

6 (a) "Alcohol" has the meaning given in s. 340.01 (1q).

for the presence of drugs or alcohol in the person's system

7 (b) "Applicant" means a person who has applied for and been offered a position
8 as an employee with an employer conditioned on successfully passing a test.

Insert 6-8

9 (f) ~~(c)~~ "Drug" means any of the following that the department determines by rule
10 promulgated under sub. (9) is subject to testing under this section:

- 11 1. A controlled substance, as defined in s. 961.01 (4).
- 12 2. A controlled substance analog, as defined in s. 961.01 (4m).
- 13 3. A prescription drug, as defined in s. 450.01 (20).
- 14 4. A drug, as defined in s. 450.01 (10), that may be dispensed without a
15 prescription.

16 (g) ~~(d)~~ "Employee" means a laborer, worker, mechanic, or truck driver who
17 performs the work described in s. 66.0903 (4), 103.49 (2m), or 103.50 (2m) on a project
18 of public works that is subject to s. 66.0903, 103.49, or 103.50.

19 (h) ~~(e)~~ "Employer" means a contractor, subcontractor, or agent of a contractor or
20 subcontractor that performs work on a project of public works that is subject to s.
21 66.0903, 103.49, or 103.50.

Insert 6-21

22 (k) ~~(f)~~ "Medical review officer" means a licensed physician who has knowledge of
23 substance abuse disorders, laboratory testing procedures, and chain-of-custody
24 procedures and who has the necessary medical training to interpret and evaluate a

BILL

An employer may contract with a ^{3rd} party administrator to administer the employer's drug and alcohol testing program under this section.

positive test result, a person's medical history, and any other relevant biomedical information.

Any person that bids

(g) "Test" means a chemical, biological, or physical instrumental analysis to determine the presence of drugs or alcohol in an employee's system.

(2) TESTING REQUIRED. ~~No person may bid~~ for a contract to perform work on a project of public works that is subject to s. 66.0903, 103.49, or 103.50 unless the person submits with the bid a statement that the person, and all subcontractors and agents that will be performing work on the project, have in place, or will have in place before any work on the project commences, a drug and alcohol testing program that complies with this section ~~and the rules promulgated under sub. (9)~~.

(3) NOTICE TO EMPLOYEES AND APPLICANTS. (a) Before testing an employee or applicant ^{is tested} for the presence of drugs or alcohol, an employer shall provide the employee or applicant with a written policy statement that contains all of the following:

1. A general statement of the employer's policy concerning employee drug or alcohol use, which statement shall include the circumstances under sub. (4) under which an employee or applicant may be required to submit to testing and the actions ^{consequences} that the employer may take with respect to an employee or applicant on the basis of a verified positive, ~~confirmed~~ test result that has been verified by a medical review officer or ~~on the basis~~ of a refusal to submit to testing.

2. A statement that the employer is required under sub. (2) to conduct drug and alcohol testing ^{program} ~~of its employees~~ as a condition for performing work on a project of public works that is subject to s. 66.0903, 103.49, or 103.50.

3. A list of all drugs for which testing is required, by brand name or common name as well as by chemical name.

Insert 7-4

LPS: website "stricken" text

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BILL

1 4. A description of the procedures specified in sub. (5) ~~and in the rules~~
2 ~~promulgated under sub. (9)~~ under which the testing is conducted and the employee
3 protections specified in sub. (6).

4 5. A list of the most common medications, by brand name or common name as
5 well as by chemical name, that may alter or affect a test.

6 6. A statement concerning the confidentiality of information relating to a test
7 as provided in sub. (8).

8 7. The names, addresses, and telephone numbers of employee assistance
9 programs and local drug and alcohol rehabilitation programs at which the employee
10 or applicant may voluntarily seek treatment.

11 8. A statement that an employee or applicant who receives a ^{positive} confirmed
12 test result may challenge or explain the result to the medical review officer within
13 5 working days after receiving notification of the test result; that, if the explanation
14 is unsatisfactory to the medical review officer, the medical review officer will report
15 the test result to the employer; and that ^{the} an employee or applicant who receives notice
16 ~~from the employer of a positive, confirmed test result that has been verified by the~~
17 ~~medical review officer may submit information to the employer challenging the test~~
18 ~~result or explaining why the test result does not constitute a violation of the~~
19 ~~employer's policy~~ ^{may} within 5 working days after receiving that notice.

20 9. A statement that the employee or applicant ~~may consult the testing~~
21 ~~laboratory for technical information regarding any prescription drugs or~~
22 ~~nonprescription drugs that the employee or applicant may be taking~~

↓
Insert
8-22
→

23 (b) An employer that requires testing under this section shall include notice of
24 that requirement on all vacancy announcements for positions for which the testing
25 is required, shall post notice of the employer's testing policy in at least one

BILL

negative for the presence of
drugs or alcohol in the
employee's system

1 conspicuous and easily accessible place on the site of the project of public works that
2 is subject to s. 66.0903, 103.49, or 103.50, and shall make available a copy of the
3 policy to any employee or applicant on request.

4 (4) WHEN TESTING REQUIRED. (a) An employer may not permit an employee to
5 work on a project of public works that is subject to s. 66.0903, 103.49, or 103.50 unless
6 the employee has ~~been~~ tested not more than 12 months preceding the date on which

7 the employee commences work on the project or unless during those 12 months the
8 employee has been participating in a random testing program under which the
9 ~~employee was tested at the commencement of the employee's participation in the~~
10 ~~program.~~

11 (b) After an employee begins work on a project of public works that is subject
12 to s. 66.0903, 103.49, or 103.50, the employer shall require the employee to submit
13 to reasonable ~~suspicion testing under par. (c), follow-up testing under par. (d), and~~
14 ~~random testing under par. (e).~~

15 (no A) (c) ^{if} If the employer has a reasonable belief, based on specific objective and
16 articulable facts and reasonable inferences drawn from those facts, that an employee
17 is using or has used drugs or alcohol in violation of the employer's policy, ~~the~~
18 ~~employer shall require the employee to submit to reasonable suspicion testing.~~

19 Those facts and inferences may be based on any of the following:

- 20 1. Facts or events observed while the employee is at work, such as direct
- 21 observation of drug or alcohol use or of the physical symptoms or manifestations of
- 22 being under the influence of drugs or alcohol.
- 23 2. Abnormal conduct or erratic behavior of the employee while at work or a
- 24 significant deterioration in the employee's work performance.
- 25 3. A report of drug or alcohol use provided by a reliable and credible source.

Insert
9-10

BILL

1 4. Evidence that the employee has tampered with a drug test during his or her
2 employment with the employer or after receiving an offer of employment with the
3 employer.

4 5. Information that the employee has caused, contributed to, or been involved
5 in an accident while at work.

6 6. Evidence that the employee has used, possessed, attempted to possess,
7 distributed, or delivered drugs or alcohol while at work, while on the employer's
8 premises or on the site of the project of public works that is subject to s. 66.0903,
9 103.49, or 103.50, or while operating the employer's vehicles, machinery, or
10 equipment.

11 7. Any other fact or event that provides a reasonable belief that the employee
12 is using or has used drugs or alcohol in violation of the employer's policy.

13 ~~(d) If an employee as a condition of continued employment enters an employee
14 assistance program for problems relating to drugs or alcohol or enters a drug or
15 alcohol rehabilitation program, the employer shall require the employee to submit
16 to testing as a follow-up to that program at least once a year for the 2-year period
17 after completion of the program. Testing under this paragraph shall be conducted
18 without prior warning~~

(c)

After an employee begins work on a project of public works that is subject to s. 66.0903, 103.49, or 103.50, the

19 ~~(e) An employer shall require an employee to submit to random testing. Each
20 year the employer shall randomly test a percentage of the employees. The
21 employer shall select employees for random testing according to objective, neutral,
22 and nondiscriminatory criteria and shall spread out the testing throughout the year
23 so that on any given day any given employee has an equal chance of being tested.
24 Testing under this paragraph shall be conducted without prior warning.~~

Each ~~year~~ ^{the} not less than 2% of the

life of the project

Employees shall be selected

shall be spread out

(2)

During the life of the project, ^{percent} not less than 2% of the employees employed on the project shall be randomly tested. Employees shall be selected

BILL

Insert
11-6

~~(5) TESTING PROCEDURES. Testing for the presence of a drug shall be accomplished through an analysis of a urine specimen provided by the employee. Testing for the presence of alcohol shall be accomplished through an analysis of a breath specimen provided by the employee. Testing under this subsection shall be performed according to procedures prescribed in rules promulgated by the department under sub. (9).~~

(6) EMPLOYEE PROTECTION. (a) Both before and after testing, an employee or applicant shall be given the opportunity to provide any information that he or she considers relevant to the test, including identification of any prescription drugs or nonprescription drugs that he or she is currently using or has recently used or any other relevant medical information.

(b) Within ^{one} ~~5~~ working days after receipt of a positive, ^{verified} ~~confirmed~~ test result that ^{or third-party administrator or medical review officer} ~~has been verified by a medical review officer~~, the employer shall inform the employee or applicant in writing of the test result, the consequences of the test result, and the options available to the employee or applicant. On request, the employer shall provide a copy of the test result to the employee or applicant.

~~(c) Within 5 working days after receiving notice of a positive, confirmed test result that has been verified by the medical review officer, the employee or applicant may submit information to the employer challenging the test result or explaining why the test result does not constitute a violation of the employer's policy.~~

~~(d) Within 20 working days after receipt of the information specified in par. (c), the employer shall determine whether the employee's challenge or explanation is satisfactory and shall inform the employee or applicant of that determination. If the challenge or explanation is unsatisfactory, the employer shall provide a written~~

or a confirmed positive test result

BILL

explanation as to why the challenge or explanation is unsatisfactory, together with a copy of the test result, to the employee or applicant.

an initial

(d) (e) An employer may not discharge, discipline, refuse to hire, or otherwise discriminate against an employee or applicant based solely on a positive test result, that has not been verified by a confirmation test and by a medical review officer.

(e) (f) An employer may not discharge, discipline, or otherwise discriminate against an employee based solely on the employee voluntarily seeking treatment for a problem relating to drug or alcohol use if the employee has not previously tested positive for drug or alcohol use, entered an employee assistance program for problems relating to drug or alcohol use, or entered a drug or alcohol rehabilitation program.

(f) (g) If testing is conducted based on reasonable suspicion under sub. (4) (b), the employer shall document in writing the circumstances on which that reasonable suspicion is based and, on request, shall provide a copy of that documentation to the employee. The employer shall retain a copy of that documentation for not less than one year.

(g) (h) Any test of an employee conducted under this section shall occur immediately before, during, or immediately after the regular work period of the employee and shall be considered to be performed during work time for purposes of determining wages, benefits, and hours of labor of the employee. The employer shall pay the cost of all testing under this section required by the employer. The employee or applicant shall pay the cost of any ^{retesting or} additional testing requested by the employee or applicant, but not required by the employer.

(7) EMPLOYER PROTECTION. (a) An employee or applicant who has a ^{verified} positive, confirmed test result ~~that has been verified by a medical review officer under this~~

, subject to reimbursement by the employer if the result of the retest or additional test is negative

Insert 12-2

Insert 12-20

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

BILL

1 ~~section~~ is not considered to be an individual with a disability, as defined in s. 111.32
2 (8).

3 ~~(b) An employer that discharges or disciplines an employee, or that refuses to
4 hire an applicant, based on a positive, confirmed test result that has been verified
5 by a medical review officer or based on a refusal of the employee or applicant to be
6 tested is considered to have done so for cause.~~

7 ~~(b)~~ (c) This section does not prohibit an employer from establishing and enforcing
8 reasonable work rules relating to the use, possession, distribution, or delivery of
9 drugs or alcohol in the workplace.

10 ~~(d) This section does not prohibit an employer from conducting a medical
11 screening or other test of an employee who provides written and informed consent
12 to the screening or other test for the purposes of determining the employee's level of
13 exposure to a potentially toxic chemical or potentially toxic substance in the
14 workplace. That screening or other testing is limited to the specific chemical or
15 substance for which the employee consents to screening or testing.~~

16 ~~(c)~~ (e) The establishment, implementation, or administration of a testing program
17 under this section does not create a physician-patient relationship between an
18 employee or applicant and the employer, ^{3rd ←} ~~a~~ ^{(a ~~3rd~~-party administrator,} a medical review officer, or any other person
19 conducting or evaluating a test under this section.

20 (8) CONFIDENTIALITY. (a) Except as required or permitted under this section,
21 any information, written or otherwise, relating to the result of a test conducted under
22 this section shall remain confidential and may be disclosed only as follows:

23 1. On the specific written consent of the employee or applicant who is the
24 subject of the test. That consent shall state the name of the person who is authorized
25 to obtain the information, the purpose of the disclosure, the precise information to

BILL

1 be disclosed, and the duration of the consent and shall be signed by the person
2 authorizing the disclosure.

3 2. On the order of a court, hearing examiner, arbitrator, or other decision maker
4 for purposes of a court proceeding, administrative proceeding, grievance proceeding,
5 or any other proceeding arising out of an adverse employment action taken as a
6 result of a test conducted under this section.

7 (b) Except as provided in par. (a) 2. and (c), information relating to the results
8 of a test conducted under this section may not be used against an employee or
9 applicant in any criminal or civil proceeding.

10 (c) An employer may use any information, written or otherwise, relating to the
11 result of a test conducted under this section in a court proceeding, administrative
12 proceeding, grievance proceeding, or any other proceeding arising out of an adverse
13 employment action taken as a result of a test conducted under this section.

14 ~~(9) RULES. The department shall promulgate rules prescribing the procedures~~
15 ~~under which the drug and alcohol testing required under this section shall be~~
16 ~~conducted. Those rules shall include all of the following:~~

17 ~~(a) A list of the drugs for which testing is required under sub. (4) and, for each~~
18 ~~of those drugs, the minimum detection level that is considered to be a positive test~~
19 ~~result.~~

20 ~~(b) The minimum alcohol concentration, as defined in s. 340.01 (1v), that is~~
21 ~~considered to be a positive test result.~~

22 ~~(c) Protocols governing the collection of urine and breath specimens from~~
23 ~~employees and applicants who are subject to testing, the initial testing of those~~
24 ~~specimens, confirmation testing of positive initial test results, verification by a~~
25 ~~medical review officer of a positive, confirmed test result, and reporting to the~~

BILL

1 employer of positive, confirmed test results that have been verified by a medical
2 review officer.

3 (d) Chain of custody procedures to ensure the integrity of a urine or breath
4 specimen collected from an employee or applicant from the point of collection to final
5 disposal of the specimen. Those procedures shall include procedures governing the
6 identification, labeling, handling, transportation, storage, and retention of
7 specimens so as to ensure reliable and accurate test results.

8 (e) Procedures under which an employee or applicant may challenge or explain
9 to the medical review officer and the employer a positive, confirmed test result

10 **SECTION 5. Nonstatutory provisions.**

11 (1) ~~RULE-MAKING.~~

12 (a) *Technical advisory committee.* The department of workforce development
13 shall appoint a technical advisory committee under section 227.13 of the statutes to
14 advise the department concerning the rules required to be promulgated under
15 section 103.503 (9) of the statutes, as created by this act. The committee shall
16 include, at a minimum, one member who is a representative of a labor organization
17 that represents employees employed in the building trades, one member who is a
18 representative of a contractor actively engaged in performing work on projects of
19 public works, and one member who is a representative of a laboratory that performs
20 drug and alcohol testing. The department of workforce development may also
21 appoint additional members who have knowledge and expertise in the area of
22 workplace drug and alcohol testing so long as the number of members representing
23 labor organizations and the number of members representing contractors are equal.

24 (b) *Rule-making deadline.* The department of workforce development shall
25 submit in proposed form the rules required under section 103.503 (9) of the statutes,

Insert
15-9

BILL

1 ~~as created by this act, to the legislative council staff under section 227.15 (1) of the~~
 2 ~~statutes no later than the first day of the 6th month beginning after the effective date~~
 3 ~~of this paragraph.~~

4 ~~(#)~~ ~~(#)~~ TRANSITIONAL PROVISIONS. An employer that is required under section
 5 103.503 (2) of the statutes, as created by this act, to have, but that does not have, a
 6 drug and alcohol testing program in place on the effective date of this subsection shall
 7 provide notice to all of its employees that a drug and alcohol testing program is being
 8 implemented and may not begin actual drug and alcohol testing until 60 days after
 9 the date of the notice. An employer that has a drug and alcohol testing program in
 10 place on the effective date of this subsection is not required to provide notice under
 11 this subsection.

SECTION 6. Initial applicability.

12
 13 (1) COLLECTIVE BARGAINING AGREEMENTS. This act first applies to an employee
 14 who is affected by a collective bargaining agreement that contains provisions
 15 inconsistent with this act on the day on which the collective bargaining agreement
 16 expires or is extended, modified, or renewed, whichever occurs first.

17 **SECTION 7. Effective dates.** This act takes effect on the first day of the 12th
 18 month beginning after publication, ~~except as follows:~~

19 ~~(1) RULE-MAKING. SECTION 5 (1) takes effect on the day after publication.~~ 2

Fix component

sub. comp.
→ ~~(#)~~

2003-2004 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1714/2ins
GMM.....

(INSERT 6-8) ✓

(c) "Certified laboratory" means a laboratory that is certified by the substance abuse and mental health services administration of the ~~U.S.~~ department of health and human services to engage in drug testing for federal agencies. *→ Federal*

(d) "Confirmatory test" means a test by a gas chromatography/mass spectrometry testing procedure of a urine specimen conducted after an initial screening test.

(e) "Confirmed positive test result" means a finding by a confirmatory test of the presence in the tested urine of any of the drugs or their metabolites specified in sub. (5) (a) to (e) at or above the minimum detection level specified in sub. (5) (a) 2., (b) 2., (c) 2., (d) 2., or (e) 2. ✓

(END OF INSERT)

(INSERT 6-21) ✓

(i) "Initial positive test result" means a finding by an initial screening test of the presence in the tested urine of any of the drugs or their metabolites specified in sub. (5) (a) to (e) at or above the minimum detection level specified in sub. (5) (a) 1., (b) 1., (c) 1., (d) 1., or (e) 1. ✓

(j) "Initial screening test" means a test by an immunoassay procedure of a urine specimen.

(END OF INSERT)

(INSERT 7-4)

A
(L) "Third-party administrator" means a person contracted by an employer, either directly or in cooperation with other employers or organizations, to administer the drug and alcohol testing program of the employer under this section.

(m) "Verified positive test result" means a confirmed positive test result that has been verified by a medical review officer.

(END OF INSERT)

(INSERT 8-22) ✓

No 9, request a retest of the specimen that tested positive by a certified laboratory chosen by the employee or applicant at the expense of the employee or applicant.

9. A statement that the employee or applicant, both before and after testing, shall be given the opportunity to provide any information that he or she considers relevant to the test, including identification of any prescription drugs or nonprescription drugs that he or she is currently using or has recently used or any other relevant medical information.

(END OF INSERT)

(INSERT 9-10) ✓

No 9 not less than 20 percent of the participants in the program are randomly tested without warning during each 12-month period, participants are selected for testing according to objective, neutral, and nondiscriminatory criteria, and testing is spread out so that on any given day any given participant has an equal chance of being tested

(END OF INSERT)

(INSERT 11-6) ✓

(5) TESTING PROCEDURE. Testing under this section shall be performed by a certified laboratory selected by the employer or ~~third~~ party administrator and shall be conducted in accordance with scientific and technical guidelines established by the substance abuse and mental health services administration of the ~~state~~

Federal

department of health and human services for those certified laboratories. At a minimum, an employee or applicant shall be tested for all of the following:

(a) Amphetamines, with the following minimum detection levels constituting a positive test result:

1. A level of 1,000 nanograms per milliliter constituting an initial positive test result.

2. A level of 500 nanograms per milliliter constituting a confirmed positive test result.

(b) Cocaine metabolites, with the following minimum detection levels constituting a positive test result:

1. A level of 300 nanograms per milliliter constituting an initial positive test result.

2. A level of 150 nanograms per milliliter constituting a confirmed positive test result.

(c) Marijuana metabolites, with the following minimum detection levels constituting a positive test result:

1. A level of 50 nanograms per milliliter constituting an initial positive test result.

2. A level of 15 nanograms per milliliter constituting a confirmed positive test result.

(d) Opiates, with the following minimum detection levels constituting a positive test result:

1. A level of 2,000 nanograms per milliliter constituting an initial positive test result.

2. A level of 2,000 nanograms per milliliter constituting a confirmed positive test result.

(e) Phencyclidine, with the following minimum detection levels constituting a positive test result:

1. A level of 25 nanograms per milliliter constituting an initial positive test result.

2. A level of 25 nanograms per milliliter constituting a confirmed positive test result.

(f) Alcohol, with an alcohol concentration of the amount specified in s. 340.01 (46m) (a) or more constituting a positive test result, as determined by an analysis of a breath specimen provided by the employee or applicant.

(END OF INSERT)

(INSERT 12-2) ✓

(c) Within 5 working days after receiving a verified positive test result, the employee or applicant may request a retest of the specimen that tested positive by a certified laboratory chosen by the employee or applicant. The employee or applicant shall pay the cost of any retesting requested by the employee or applicant, but not required by the employer, subject to reimbursement by the employer if the result of the retest is negative.

(END OF INSERT)

(INSERT 12-20) ✓

(No 9) . If the test is conducted during an employee's regular work period, the employee shall be paid for the time lost from work at the employee's hourly basic rate of pay, as defined **(18)** s. 103.49 (1) (b), plus the hourly contribution for health insurance

benefits, vacation benefits, pension benefits, and any other bona fide economic benefits payable to the employee. If the test is conducted outside the employee's regular work period, the employee shall be paid for the time necessary to take the test, including reasonable travel time, at the employee's hourly basic rate of pay.

(END OF INSERT)

(INSERT 15-9)

(9) RECORDS; INSPECTION; ENFORCEMENT. (a) Each employer shall keep full and accurate records documenting the employer's compliance with this section. The department or a contracting local governmental unit under s. 66.0903 may demand and examine, and every employer shall keep, and furnish upon request by the department or local governmental unit, copies of all records and information relating to the employer's compliance with this section. The department may inspect records in the manner provided in this chapter, and every employer is subject to the requirements of this chapter relating to the examination of records.

(b) If requested by any person, the department shall inspect the records of any employer to ensure compliance with this section. If the employer subject to the inspection is found to be in compliance and if the person making the request is a person performing the work specified in s. 66.0903 (4), 103.49 (2m), or 103.50 (2m), the department shall charge the person making the request the actual cost of the inspection. If the employer subject to the inspection is found to be in compliance and if the person making the request is not a person performing the work specified in s. 66.0903 (4), 103.49 (2m), or 103.50 (2m), the department shall charge the person making the request \$250 or the actual cost of the inspection, whichever is greater.

(10) NONCOMPLIANCE; PENALTIES. (a) An employee or applicant who refuses to submit to testing as required under this section or who is the subject of a verified positive test result may not be permitted to work on a project of public works that is subject to s. 66.0903, 103.49, or 103.50 until the employee or applicant tests negative for the presence of drugs or alcohol in his or her system. An employee who is the subject of more than one verified positive test result during the life of a project of public works that is subject to s. 66.0903, 103.49, or 103.50 may not work on the project for the life of the project.

(b) Any employer that permits an employee to work on a project of public works that is subject to s. 66.0903, 103.49, or 103.50 in violation of this section may be fined not more than \$200 or imprisoned for not more than 6 months or both. Each day that a violation continues is a separate offense.

(11) DEPARTMENT. (a) Except as provided under pars. (b) and (c), the department shall distribute to all state agencies a list of all persons whom the department has found to have permitted an employee to work on a project of public works that is subject to s. 66.0903, 103.49, or 103.50 in violation of this section at any time in the preceding 3 years and shall notify any local governmental unit applying for a determination under s. 66.0903 (3) or exempted under s. 66.0903 (6) of the names of those persons. The department shall include with any name the address of the person and shall specify the date of the violation. A state agency or local governmental unit may not award any contract to the person unless otherwise recommended by the department or unless 3 years have elapsed from the date the department issued its findings or date of final determination by a court of competent jurisdiction, whichever is later.

(b) The department may not include in a notification under par. (a) the name of any person on the basis of having let work to a person whom the department has found to have permitted an employee to work on a project of public works that is subject to s. 66.0903, 103.49, or 103.50 in violation of this section.

(c) This subsection does not apply to any employer that in good faith commits a minor violation of this section, as determined on a case-by-case basis through administrative hearings with all rights to due process afforded to all parties or who has not exhausted or waived all appeals.

(d) Any person submitting a bid on a project that is subject to s. 66.0903, 103.49, or 103.50 shall, on the date ^{on which} the person submits the bid, identify any construction business in which the person, or a shareholder, officer, or partner of the person, if the person is a business, owns, or has owned ^{at least a 25 percent} interest on the date ^{on which} the person submits the bid or at any other time within 3 years preceding the date ^{on which} the person submits the bid, if the business has been found to have permitted an employee to work on a project of public works that is subject to s. 66.0903, 103.49, or 103.50 in violation of this section.

(END OF INSERT)

(INSERT A)

Finally, the bill specifies that an employee or applicant who fails to submit to testing as required under the bill or who is the subject of a verified positive test result may not be permitted to work on a project of public works that is subject to the prevailing wage law until the employee or applicant tests negative for the presence of drugs or alcohol in his or her system and that an employee who is the subject of more than one verified positive test result during the life of a project of public works that is subject to the prevailing wage law may not work on the project for the life of the project. An employer that permits an employee to work on a project of public works that is subject to the prevailing wage law in violation of the bill is subject to a fine of \$200 or imprisonment for not more than six months or both for each day of

the violation and is subject to debarment from contracting with any state agency or local governmental unit for three years from the date of the violation.

(END OF INSERT)

→
CRIME ✓



State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-1714/Z
GMM:kmg:jf

MON 9/15

(Types - pp. 8, 11, 19)

2003 BILL

3
RMR

1 AN ACT *Gen. Cat.* to create 16.855 (9m), 66.0901 (10), 84.06 (2) (c) and 103.503 of the
2 statutes; **relating to:** drug and alcohol testing of employees who are required
3 to be paid the prevailing wage rate for work performed on projects of public
4 works.

Analysis by the Legislative Reference Bureau

Under current law, subject to certain exceptions, all laborers, workers, mechanics, and truck drivers employed on a state or local public works project whose estimated cost of completion is \$37,000 or more for a single-trade public works project or \$180,000 or more for a multiple-trade public works project must be paid at the rate paid for a majority of the hours worked in the person's trade or occupation in the county in which the project is located (prevailing wage law).

This bill requires any person that bids for a contract to perform work on a public works project that is subject to the prevailing wage law (project) to submit with the bid a statement that the person, and all subcontractors and agents that will be performing work on the project, (employer) have in place, or will have in place before any work on the project commences, a drug and alcohol testing program that complies with the bill. The bill permits an employer to contract with a third-party administrator to administer the employer's drug and alcohol testing program.

Under the bill, an employer may not permit a laborer, worker, mechanic, or truck driver who is covered under the prevailing wage law (employee) to work on a project unless the employee has tested negative for the presence of drugs or alcohol in the employee's system not more than 12 months preceding the date on which the

BILL

employee commences work on the project or unless during those 12 months the employee has been participating in a random testing program. After an employee begins work on a project, the employee must submit to reasonable suspicion testing, which is testing conducted based on a reasonable belief of the employer that the employee is using or has used drugs or alcohol in violation of the employer's policy, and random testing, which is testing conducted randomly on not less than 20 percent of the employees employed on the project according to objective, neutral, and nondiscriminatory criteria and spread out throughout the life of the project so that on any given day any given employee has an equal chance of being tested.

The bill defines a "drug" as any controlled substance, controlled substance analog, prescription drug, or nonprescription drug that the employer determines is subject to testing under the bill, requires, at a minimum, that employees be tested for amphetamines, cocaine, marijuana, opiates, phencyclidine, and alcohol, and specifies the minimum detection levels that constitute a positive test result.

The bill requires an employer or third-party administrator, before testing an employee or a person who has been offered a position contingent on passing a test (applicant), to provide the employee or applicant with a written policy statement that is required under the bill to include certain information, including all of the following:

1. A general statement of the employer's policy concerning drug or alcohol use, which statement must include the circumstances under which an employee or applicant may be required to submit to testing and the consequences of a refusal to submit to testing or of a verified positive test result, which is defined in the bill as an initial positive test result that has been confirmed by a second test and that has been verified by a licensed physician who has knowledge of substance abuse disorders, laboratory testing procedures, and chain-of-custody procedures and who has the necessary medical training to interpret and evaluate a positive test result, a person's medical history, and any other relevant biomedical information (medical review officer).

2. A statement that the testing is required as a condition of performing work on a project.

3. A list of the drugs for which testing is required.

4. A description of the procedures under which the testing is conducted and the employee protections specified in the bill.

5. A list of the most common medications that may alter or affect a test.

6. A statement concerning the confidentiality of information relating to a test as provided in the bill. Specifically, the bill provides that information relating to a test result is confidential and may be disclosed only on the specific written consent of the employee or applicant or on the order of a court, hearing examiner, arbitrator, or other decision maker for purposes of a proceeding arising out of an adverse employment action taken as a result of the test. The bill further provides that information relating to a test result may not be used against an employee or applicant in any criminal or civil proceeding, except by the employer in a proceeding arising out of an adverse employment action taken as a result of the test.

BILL

7. The names, addresses, and telephone numbers of employee assistance programs and local drug and alcohol rehabilitation programs at which the employee may voluntarily seek treatment.

8. A statement that the employee or applicant may challenge or explain a confirmed positive test result to the medical review officer and may request a retest of a specimen that has tested positive by a laboratory chosen by the employee or applicant at the expense of the employee or applicant.

9. A statement that the employee or applicant, both before and after the test, may provide any information that is relevant to the test, including identification of any prescription or nonprescription drugs that the employee or applicant is currently using or has recently used and any other relevant medical information.

The bill affords certain protections to an employee or applicant who is required to be tested under the bill. Specifically, under the bill:

1. An employee or applicant must be given the opportunity to provide, both before and after a test, information that is relevant to the test, including identification of any prescription or nonprescription drugs that the employee or applicant is taking and any other relevant medical information.

2. The employer or 3rd-party administrator must inform an employee or applicant of a verified positive test result, the consequences of the test result, and the options available to the employee or applicant, within one working day after the employer receives the test result; the employee or applicant may, within five working days after receiving that notice, request a retest of a specimen that tested positive by a laboratory chosen by the employee or applicant at the expense of the employee or applicant.

3. An employee may not be discharged, disciplined, or otherwise discriminated against solely on the basis of voluntarily seeking treatment for a problem relating to drug or alcohol use, if the employee has not previously tested positive for drug or alcohol use, entered an employee assistance program for problems relating to drug or alcohol use, or entered a drug or alcohol rehabilitation program, and an employee or applicant may not be discharged, disciplined, or otherwise discriminated against based solely on an initial positive test result or a confirmed positive test result that has not been verified by a medical review officer.

4. In the case of reasonable-suspicion testing, the employer must provide the employee with documentation of the circumstances on which the reasonable suspicion is based.

5. A test must be conducted immediately before, during, or immediately after work and at the employer's expense, except that any retesting or additional testing requested by the employee or applicant, but not required by the employer, is at the expense of the employee or applicant, subject to reimbursement by the employer if the result of the retest or additional test is negative. The bill also provides that if the testing is conducted during an employee's regular work hours the employee shall be paid for the time lost from work at the employee's regular rate of pay, plus benefits, and if the testing is conducted outside of those hours the employee shall be paid for the time necessary to take the test at the employee's regular rate of pay, excluding benefits.

BILL

Similarly, the bill affords certain protections to an employer that is required to conduct drug or alcohol testing under the bill. Specifically, under the bill:

1. An employee or applicant who has a verified positive test result is not considered to be an individual with a disability for purposes of the law prohibiting discrimination in employment on the basis of disability.

2. An employer is not prohibited from establishing and enforcing reasonable work rules relating the use, possession, distribution, or delivery of drugs or alcohol in the workplace.

3. A physician-patient relationship is not created between an employee or applicant and the employer, a third-party administrator, a medical review officer, or any other person conducting or evaluating a test under the bill.

Finally, the bill specifies that an employee or applicant who fails to submit to testing as required under the bill or who is the subject of a verified positive test result may not be permitted to work on a project of public works that is subject to the prevailing wage law until the employee or applicant tests negative for the presence of drugs or alcohol in his or her system and that an employee who is the subject of more than one verified positive test result during the life of a project of public works that is subject to the prevailing wage law may not work on the project for the life of the project. An employer that permits an employee to work on a project of public works that is subject to the prevailing wage law in violation of the bill is subject to a fine of \$200 or imprisonment for not more than six months or both for each day of the violation and is subject to debarment from contracting with any state agency or local governmental unit for three years from the date of the violation.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 16.855 (9m) of the statutes is created to read:
2 **16.855 (9m)** The department shall require a bidder for a contract to perform
3 construction work on a project of public works that is subject to s. 103.49 to submit
4 with the bid a statement that the bidder, and all subcontractors and agents that will
5 be performing work on the project, have in place, or will have in place before any work
6 on the project commences, a drug and alcohol testing program that complies with s.

BILL

1 103.503. A statement specified under this subsection shall be submitted on a form
2 that is adopted and furnished by the department of workforce development.

3 **SECTION 2.** 66.0901 (10) of the statutes is created to read:

4 **66.0901 (10) DRUG AND ALCOHOL TESTING REQUIREMENTS.** A municipality shall
5 require a bidder for a public contract that is subject to s. 66.0903 to submit with the
6 bid a statement that the bidder, and all subcontractors and agents that will be
7 performing work under the public contract, have in place, or will have in place before
8 any work under the public contract commences, a drug and alcohol testing program
9 that complies with s. 103.503. A statement specified under this subsection shall be
10 submitted on a form that is adopted and furnished by the department of workforce
11 development.

12 **SECTION 3.** 84.06 (2) (c) of the statutes is created to read:

13 **84.06 (2) (c)** The department or an agent under par. (b) shall require a bidder
14 for a contract to perform construction work on a project of highway improvements
15 that is subject to s. 103.50 to submit with the bid a statement that the bidder, and
16 all subcontractors and agents that will be performing work on the project, have in
17 place, or will have in place before any work on the project commences, a drug and
18 alcohol testing program that complies with s. 103.503. A statement specified under
19 this paragraph shall be submitted on a form that is adopted and furnished by the
20 department of workforce development.

21 **SECTION 4.** 103.503 of the statutes is created to read:

22 **103.503 Drug-free public works projects. (1) DEFINITIONS.** In this section:

23 (a) "Alcohol" has the meaning given in s. 340.01 (1q).

BILL

1 (b) “Applicant” means a person who has applied for and been offered a position
2 as an employee with an employer conditioned on successfully passing a test for the
3 presence of drugs or alcohol in the person’s system.

4 (c) “Certified laboratory” means a laboratory that is certified by the substance
5 abuse and mental health services administration of the federal department of health
6 and human services to engage in drug testing for federal agencies.

7 (d) “Confirmatory test” means a test by a gas chromatography/mass
8 spectrometry testing procedure of a urine specimen conducted after an initial
9 screening test.

10 (e) “Confirmed positive test result” means a finding by a confirmatory test of
11 the presence in the tested urine of any of the drugs or their metabolites specified in
12 sub. (5) (a) to (e) at or above the minimum detection level specified in sub. (5) (a) 2.,
13 (b) 2., (c) 2., (d) 2., or (e) 2.

14 (f) “Drug” means any of the following that the department determines by rule
15 promulgated under sub. (9) is subject to testing under this section:

16 1. A controlled substance, as defined in s. 961.01 (4).

17 2. A controlled substance analog, as defined in s. 961.01 (4m).

18 3. A prescription drug, as defined in s. 450.01 (20).

19 4. A drug, as defined in s. 450.01 (10), that may be dispensed without a
20 prescription.

21 (g) “Employee” means a laborer, worker, mechanic, or truck driver who
22 performs the work described in s. 66.0903 (4), 103.49 (2m), or 103.50 (2m) on a project
23 of public works that is subject to s. 66.0903, 103.49, or 103.50.

BILL

1 (h) “Employer” means a contractor, subcontractor, or agent of a contractor or
2 subcontractor that performs work on a project of public works that is subject to s.
3 66.0903, 103.49, or 103.50.

4 (i) “Initial positive test result” means a finding by an initial screening test of
5 the presence in the tested urine of any of the drugs or their metabolites specified in
6 sub. (5) (a) to (e) at or above the minimum detection level specified in sub. (5) (a) 1.,
7 (b) 1., (c) 1., (d) 1., or (e) 1.

8 (j) “Initial screening test” means a test by an immunoassay procedure of a urine
9 specimen.

10 (k) “Medical review officer” means a licensed physician who has knowledge of
11 substance abuse disorders, laboratory testing procedures, and chain-of-custody
12 procedures and who has the necessary medical training to interpret and evaluate a
13 positive test result, a person’s medical history, and any other relevant biomedical
14 information.

15 (L) “Third-party administrator” means a person contracted by an employer,
16 either directly or in cooperation with other employers or organizations, to administer
17 the drug and alcohol testing program of the employer under this section.

18 (m) “Verified positive test result” means a confirmed positive test result that
19 has been verified by a medical review officer.

20 (2) TESTING REQUIRED. Any person that bids for a contract to perform work on
21 a project of public works that is subject to s. 66.0903, 103.49, or 103.50 shall submit
22 with the bid a statement on a form adopted by the department that the person, and
23 all subcontractors and agents that will be performing work on the project, have in
24 place, or will have in place before any work on the project commences, a drug and
25 alcohol testing program that complies with this section. An employer may contract

BILL

1 with a 3rd-party administrator to administer the employer's drug and alcohol
2 testing program under this section.

3 (3) NOTICE TO EMPLOYEES AND APPLICANTS. (a) Before an employee or applicant
4 is tested for the presence of drugs or alcohol, an employer or 3rd-party administrator
5 shall provide the employee or applicant with a written policy statement that contains
6 all of the following:

ar

7 1. A general statement of the employer's policy concerning employee drug or
8 alcohol use, which statement shall include the circumstances under sub. (4) under
9 which an employee or applicant may be required to submit to testing and the
10 consequences of a verified positive test result of a refusal to submit to testing.

11 2. A statement that the employer is required under sub. (2) to have in place a
12 drug and alcohol testing program as a condition for performing work on a project of
13 public works that is subject to s. 66.0903, 103.49, or 103.50.

14 3. A list of all drugs for which testing is required, by brand name or common
15 name as well as by chemical name.

16 4. A description of the procedures specified in sub. (5) under which the testing
17 is conducted and the employee protections specified in sub. (6).

18 5. A list of the most common medications, by brand name or common name as
19 well as by chemical name, that may alter or affect a test.

20 6. A statement concerning the confidentiality of information relating to a test
21 as provided in sub. (8).

22 7. The names, addresses, and telephone numbers of employee assistance
23 programs and local drug and alcohol rehabilitation programs at which the employee
24 or applicant may voluntarily seek treatment.

BILL

1 8. A statement that an employee or applicant who receives a confirmed positive
2 test result may challenge or explain the result to the medical review officer within
3 5 working days after receiving notification of the test result; that, if the explanation
4 is unsatisfactory to the medical review officer, the medical review officer will report
5 the test result to the employer; and that the employee or applicant may, within 5
6 working days after receiving that notice, request a retest of the specimen that tested
7 positive by a certified laboratory chosen by the employee or applicant at the expense
8 of the employee or applicant.

9 9. A statement that the employee or applicant, both before and after testing,
10 shall be given the opportunity to provide any information that he or she considers
11 relevant to the test, including identification of any prescription drugs or
12 nonprescription drugs that he or she is currently using or has recently used or any
13 other relevant medical information.

14 (b) An employer that requires testing under this section shall include notice of
15 that requirement on all vacancy announcements for positions for which the testing
16 is required, shall post notice of the employer's testing policy in at least one
17 conspicuous and easily accessible place on the site of the project of public works that
18 is subject to s. 66.0903, 103.49, or 103.50, and shall make available a copy of the
19 policy to any employee or applicant on request.

20 (4) WHEN TESTING REQUIRED. (a) An employer may not permit an employee to
21 work on a project of public works that is subject to s. 66.0903, 103.49, or 103.50 unless
22 the employee has tested negative for the presence of drugs or alcohol in the
23 employee's system not more than 12 months preceding the date on which the
24 employee commences work on the project or unless during those 12 months the
25 employee has been participating in a random testing program under which not less

BILL

1 than 20 percent of the participants in the program are randomly tested without
2 warning during each 12-month period, participants are selected for testing
3 according to objective, neutral, and nondiscriminatory criteria, and testing is spread
4 out so that on any given day any given participant has an equal chance of being
5 tested.

6 (b) After an employee begins work on a project of public works that is subject
7 to s. 66.0903, 103.49, or 103.50, the employer shall require the employee to submit
8 to reasonable-suspicion testing if the employer has a reasonable belief, based on
9 specific objective and articulable facts and reasonable inferences drawn from those
10 facts, that an employee is using or has used drugs or alcohol in violation of the
11 employer's policy. Those facts and inferences may be based on any of the following:

12 1. Facts or events observed while the employee is at work, such as direct
13 observation of drug or alcohol use or of the physical symptoms or manifestations of
14 being under the influence of drugs or alcohol.

15 2. Abnormal conduct or erratic behavior of the employee while at work or a
16 significant deterioration in the employee's work performance.

17 3. A report of drug or alcohol use provided by a reliable and credible source.

18 4. Evidence that the employee has tampered with a drug test during his or her
19 employment with the employer or after receiving an offer of employment with the
20 employer.

21 5. Information that the employee has caused, contributed to, or been involved
22 in an accident while at work.

23 6. Evidence that the employee has used, possessed, attempted to possess,
24 distributed, or delivered drugs or alcohol while at work, while on the employer's
25 premises or on the site of the project of public works that is subject to s. 66.0903,

BILL

1 103.49, or 103.50, or while operating the employer's vehicles, machinery, or
2 equipment.

3 7. Any other fact or event that provides a reasonable belief that the employee
4 is using or has used drugs or alcohol in violation of the employer's policy.

5 (c) After an employee begins work on a project of public works that is subject
6 to s. 66.0903, 103.49, or 103.50, the employer shall require the employee to submit
7 to random testing. During the life of the project, not less than ~~23~~²⁰ percent of the
8 employees employed on the project shall be randomly tested. Employees shall be
9 selected for random testing according to objective, neutral, and nondiscriminatory
10 criteria, and the testing shall be spread out throughout the life of the project so that
11 on any given day any given employee has an equal chance of being tested. Testing
12 under this paragraph shall be conducted without prior warning.

13 (5) TESTING PROCEDURE. Testing under this section shall be performed by a
14 certified laboratory selected by the employer or 3rd-party administrator and shall
15 be conducted in accordance with scientific and technical guidelines established by
16 the substance abuse and mental health services administration of the federal
17 department of health and human services for those certified laboratories. At a
18 minimum, an employee or applicant shall be tested for all of the following:

19 (a) Amphetamines, with the following minimum detection levels constituting
20 a positive test result:

21 1. A level of 1,000 nanograms per milliliter constituting an initial positive test
22 result.

23 2. A level of 500 nanograms per milliliter constituting a confirmed positive test
24 result.

BILL

1 (b) Cocaine metabolites, with the following minimum detection levels
2 constituting a positive test result:

3 1. A level of 300 nanograms per milliliter constituting an initial positive test
4 result.

5 2. A level of 150 nanograms per milliliter constituting a confirmed positive test
6 result.

7 (c) Marijuana metabolites, with the following minimum detection levels
8 constituting a positive test result:

9 1. A level of 50 nanograms per milliliter constituting an initial positive test
10 result.

11 2. A level of 15 nanograms per milliliter constituting a confirmed positive test
12 result.

13 (d) Opiates, with the following minimum detection levels constituting a
14 positive test result:

15 1. A level of 2,000 nanograms per milliliter constituting an initial positive test
16 result.

17 2. A level of 2,000 nanograms per milliliter constituting a confirmed positive
18 test result.

19 (e) Phencyclidine, with the following minimum detection levels constituting a
20 positive test result:

21 1. A level of 25 nanograms per milliliter constituting an initial positive test
22 result.

23 2. A level of 25 nanograms per milliliter constituting a confirmed positive test
24 result.

BILL

1 (f) Alcohol, with an alcohol concentration of the amount specified in s. 340.01
2 (46m) (a) or more constituting a positive test result, as determined by an analysis of
3 a breath specimen provided by the employee or applicant.

4 (6) EMPLOYEE PROTECTION. (a) Both before and after testing, an employee or
5 applicant shall be given the opportunity to provide any information that he or she
6 considers relevant to the test, including identification of any prescription drugs or
7 nonprescription drugs that he or she is currently using or has recently used or any
8 other relevant medical information.

9 (b) Within one working day after receipt of a verified positive test result, the
10 employer or 3rd-party administrator shall inform the employee or applicant in
11 writing of the test result, the consequences of the test result, and the options
12 available to the employee or applicant. On request, the 3rd-party administrator or
13 medical review officer shall provide a copy of the test result to the employee or
14 applicant.

15 (c) Within 5 working days after receiving a verified positive test result, the
16 employee or applicant may request a retest of the specimen that tested positive by
17 a certified laboratory chosen by the employee or applicant. The employee or
18 applicant shall pay the cost of any retesting requested by the employee or applicant,
19 but not required by the employer, subject to reimbursement by the employer if the
20 result of the retest is negative.

21 (d) An employer may not discharge, discipline, refuse to hire, or otherwise
22 discriminate against an employee or applicant based solely on an initial positive test
23 result or a confirmed positive test result that has not been verified by a medical
24 review officer.

BILL

1 (e) An employer may not discharge, discipline, or otherwise discriminate
2 against an employee based solely on the employee voluntarily seeking treatment for
3 a problem relating to drug or alcohol use if the employee has not previously tested
4 positive for drug or alcohol use, entered an employee assistance program for
5 problems relating to drug or alcohol use, or entered a drug or alcohol rehabilitation
6 program.

7 (f) If testing is conducted based on reasonable suspicion under sub. (4) (b), the
8 employer shall document in writing the circumstances on which that reasonable
9 suspicion is based and, on request, shall provide a copy of that documentation to the
10 employee. The employer shall retain a copy of that documentation for not less than
11 one year.

12 (g) Any test of an employee conducted under this section shall occur
13 immediately before, during, or immediately after the regular work period of the
14 employee. If the test is conducted during an employee's regular work period, the
15 employee shall be paid for the time lost from work at the employee's hourly basic rate
16 of pay, as defined in s. 103.49 (1) (b), plus the hourly contribution for health insurance
17 benefits, vacation benefits, pension benefits, and any other bona fide economic
18 benefits payable to the employee. If the test is conducted outside the employee's
19 regular work period, the employee shall be paid for the time necessary to take the
20 test, including reasonable travel time, at the employee's hourly basic rate of pay. The
21 employer shall pay the cost of all testing under this section required by the employer.
22 The employee or applicant shall pay the cost of any retesting or additional testing
23 requested by the employee or applicant, but not required by the employer, subject to
24 reimbursement by the employer if the result of the retest or additional test is
25 negative.

BILL

1 (7) EMPLOYER PROTECTION. (a) An employee or applicant who has a verified
2 positive test result is not considered to be an individual with a disability, as defined
3 in s. 111.32 (8).

4 (b) This section does not prohibit an employer from establishing and enforcing
5 reasonable work rules relating to the use, possession, distribution, or delivery of
6 drugs or alcohol in the workplace.

7 (c) The establishment, implementation, or administration of a testing program
8 under this section does not create a physician–patient relationship between an
9 employee or applicant and the employer, a 3rd–party administrator, a medical
10 review officer, or any other person conducting or evaluating a test under this section.

11 (8) CONFIDENTIALITY. (a) Except as required or permitted under this section,
12 any information, written or otherwise, relating to the result of a test conducted under
13 this section shall remain confidential and may be disclosed only as follows:

14 1. On the specific written consent of the employee or applicant who is the
15 subject of the test. That consent shall state the name of the person who is authorized
16 to obtain the information, the purpose of the disclosure, the precise information to
17 be disclosed, and the duration of the consent and shall be signed by the person
18 authorizing the disclosure.

19 2. On the order of a court, hearing examiner, arbitrator, or other decision maker
20 for purposes of a court proceeding, administrative proceeding, grievance proceeding,
21 or any other proceeding arising out of an adverse employment action taken as a
22 result of a test conducted under this section.

23 (b) Except as provided in par. (a) 2. and (c), information relating to the results
24 of a test conducted under this section may not be used against an employee or
25 applicant in any criminal or civil proceeding.

BILL

1 (c) An employer may use any information, written or otherwise, relating to the
2 result of a test conducted under this section in a court proceeding, administrative
3 proceeding, grievance proceeding, or any other proceeding arising out of an adverse
4 employment action taken as a result of a test conducted under this section.

5 (9) RECORDS; INSPECTION; ENFORCEMENT. (a) Each employer shall keep full and
6 accurate records documenting the employer's compliance with this section. The
7 department or a contracting local governmental unit under s. 66.0903 may demand
8 and examine, and every employer shall keep, and furnish upon request by the
9 department or local governmental unit, copies of all records and information relating
10 to the employer's compliance with this section. The department may inspect records
11 in the manner provided in this chapter, and every employer is subject to the
12 requirements of this chapter relating to the examination of records.

13 (b) If requested by any person, the department shall inspect the records of any
14 employer to ensure compliance with this section. If the employer subject to the
15 inspection is found to be in compliance and if the person making the request is a
16 person performing the work specified in s. 66.0903 (4), 103.49 (2m), or 103.50 (2m),
17 the department shall charge the person making the request the actual cost of the
18 inspection. If the employer subject to the inspection is found to be in compliance and
19 if the person making the request is not a person performing the work specified in s.
20 66.0903 (4), 103.49 (2m), or 103.50 (2m), the department shall charge the person
21 making the request \$250 or the actual cost of the inspection, whichever is greater.

22 (10) NONCOMPLIANCE; PENALTIES. (a) An employee or applicant who refuses to
23 submit to testing as required under this section or who is the subject of a verified
24 positive test result may not be permitted to work on a project of public works that is
25 subject to s. 66.0903, 103.49, or 103.50 until the employee or applicant tests negative

BILL

1 for the presence of drugs or alcohol in his or her system. An employee who is the
2 subject of more than one verified positive test result during the life of a project of
3 public works that is subject to s. 66.0903, 103.49, or 103.50 may not work on the
4 project for the life of the project.

5 (b) Any employer that permits an employee to work on a project of public works
6 that is subject to s. 66.0903, 103.49, or 103.50 in violation of this section may be fined
7 not more than \$200 or imprisoned for not more than 6 months or both. Each day that
8 a violation continues is a separate offense.

9 (11) DEPARTMENT. (a) Except as provided under pars. (b) and (c), the department
10 shall distribute to all state agencies a list of all persons whom the department has
11 found to have permitted an employee to work on a project of public works that is
12 subject to s. 66.0903, 103.49, or 103.50 in violation of this section at any time in the
13 preceding 3 years and shall notify any local governmental unit applying for a
14 determination under s. 66.0903 (3) or exempted under s. 66.0903 (6) of the names of
15 those persons. The department shall include with any name the address of the
16 person and shall specify the date of the violation. A state agency or local
17 governmental unit may not award any contract to the person unless otherwise
18 recommended by the department or unless 3 years have elapsed from the date on
19 which the department issued its findings or date of final determination by a court of
20 competent jurisdiction, whichever is later.

21 (b) The department may not include in a notification under par. (a) the name
22 of any person on the basis of having let work to a person whom the department has
23 found to have permitted an employee to work on a project of public works that is
24 subject to s. 66.0903, 103.49, or 103.50 in violation of this section.

BILL

1 (c) This subsection does not apply to any employer that in good faith commits
2 a minor violation of this section, as determined on a case-by-case basis through
3 administrative hearings with all rights to due process afforded to all parties, or that
4 has not exhausted or waived all appeals.

5 (d) Any person submitting a bid on a project that is subject to s. 66.0903, 103.49,
6 or 103.50 shall, on the date on which the person submits the bid, identify any
7 construction business in which the person, or a shareholder, officer, or partner of the
8 person, if the person is a business, owns, or has owned, at least a 25 percent interest
9 on the date on which the person submits the bid or at any other time within 3 years
10 preceding the date on which the person submits the bid, if the business has been
11 found to have permitted an employee to work on a project of public works that is
12 subject to s. 66.0903, 103.49, or 103.50 in violation of this section.

SECTION 5. Nonstatutory provisions.

13
14 (1) TRANSITIONAL PROVISIONS. An employer that is required under section
15 103.503 (2) of the statutes, as created by this act, to have, but that does not have, a
16 drug and alcohol testing program in place on the effective date of this subsection shall
17 provide notice to all of its employees that a drug and alcohol testing program is being
18 implemented and may not begin actual drug and alcohol testing until 60 days after
19 the date of the notice. An employer that has a drug and alcohol testing program in
20 place on the effective date of this subsection is not required to provide notice under
21 this subsection.

SECTION 6. Initial applicability.

22
23 (1) COLLECTIVE BARGAINING AGREEMENTS. This act first applies to an employee
24 who is affected by a collective bargaining agreement that contains provisions

BILL

1 inconsistent with this act on the day on which the collective bargaining agreement
2 expires or is extended, modified, or renewed, whichever occurs first.

3 **SECTION 7. Effective date.**

13th

4 (1) This act takes effect on the first day of the ~~12th~~ month beginning after
5 publication.

6 (END)