

**2005 DRAFTING REQUEST**

**Bill**

Received: **08/31/2004**

Received By: **gmalaise**

Wanted: **As time permits**

Identical to LRB:

For: **Jeff Stone (608) 266-8590**

By/Representing: **Himself**

This file may be shown to any legislator: **NO**

Drafter: **gmalaise**

May Contact: **Jeff Beiringer (414) 543-7622**  
**Brian Mitchell (262) 432-0035**

Addl. Drafters:

Subject: **Employ Priv - health and safety**  
**Employ Priv - prevailing wage**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Stone@legis.state.wi.us**

Carbon copy (CC:) to:

**Pre Topic:**

No specific pre topic given

**Topic:**

Drug-free construction sites

**Instructions:**

See Attached--redraft 2003 AB 682 with attached changes

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	gmalaise 09/13/2004	wjackson 10/04/2004		_____			S&L Crime
/1		wjackson 10/13/2004	rschluet 10/13/2004	_____	mbarman 10/13/2004		S&L Crime
/2	gmalaise	wjackson	jfrantze	_____	sbasford		S&L

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	02/02/2005	02/03/2005	02/04/2005	_____	02/04/2005		Crime
/3	gmalaise 07/06/2005	wjackson 07/07/2005	rschluet 07/12/2005	_____	Inorthro 07/12/2005	Inorthro 09/20/2005	

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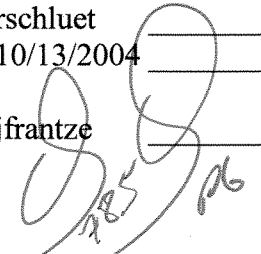
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13 wLj 7/7

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/?	gmalaise	1 WLj 10/11					
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FE Sent For:

<END>

Tues 5/11

One look → cause  
Quick tests ex. then?

Responses to Representative Nass  
Assembly Bill 682

1.) The compatibility of AB 682 with other drug testing programs. For example, there was concern expressed that the requirements in AB 682 are significantly different than CDL drug/alcohol testing rules. This could lead to an employer having to operate more than one drug/alcohol testing program to comply with both state and federal law. *Does not apply to CDL or any other testing program under state or federal law*

*The intent of the bill is to require that employees be tested or be subject to testing, not so much to spell out the specifics of every testing program or to require redundant testing. We recommend that the drafter modify the language to make it clear that any employees subject to random testing under state or federal law (CDL, for example) would not be required to be tested separately to comply with AB 682 and would be "grandfathered."*

2.) The provisions of AB 682 appear to place prime contractors in the unfair position of being responsible for the acts of subcontractors in complying with these requirements. Compliance with any drug/alcohol testing requirements should be the sole responsibility of the appropriate employer.

*The intent of the bill is to require each contractor to be responsible solely for its own actions. The bill may need to be drafted to make this more explicit. General contractors, therefore, would not be responsible for the actions of their subcontractors with regard to compliance with AB 682. We envisioned something similar to prevailing wage - any non-payment of wages by an employer on the project results in a DWD action against that employer, not the general contractor. We would also recommend that the drafter require DWD to include language on the certificate of compliance stating that the contractor signing the form is responsible for its own representations but not responsible for any misrepresentations by its subcontractors.* *bid penalties* *statement from each sub*

3.) The transportation construction industry is concerned with how its companies would meet the minimum 20% random drug/alcohol testing requirement. The nature of construction in this industry has employees moving frequently around to various worksites.

*This issue will be discussed at length with the Wisconsin Transportation Builders Association and other interested parties.*

4.) The language of AB 682 seems to allow an employee up to five days to retest after an initial positive test. A concern has been raised that the employee should have a shorter period of time to request a retest.

*The allowable time for requesting a retest can probably be reduced to as little as 48 hours or two working days. As a practical matter, the results from a retest will probably not be available for 72 hours from the time the retest is requested.*

*- 2 working days to request*

5.)

The bill provides a limited good faith protection for employers that violate its provisions. Some believe the good faith protection needs to be expanded to protect employers from severe punishments for minor or unintended violations.

*We would recommend that the drafter incorporate all of the provisions of Section 15 of the "Model Drug-Free Private Sector Workplace Act - Policy Statement." We would also ask whether Section 6, paragraph (e) on page 14 can be eliminated.* employees already protected ADA

6.)

The proposal contains language regarding reasonable suspicion testing. The nature of this provision will require that employers provide training to supervisors in the best ways to determine "reasonable belief." It will also increase the employer's risk of employee grievances and/or litigation.

*We believe this is a necessary provision for any substance abuse testing program. It is true that it may require some form of education or checklist, but that is a prudent action on the part of any employer.*

*The bill has been interpreted by some to require reasonable suspicion testing. We believe the employer has the right to do it, but is not obligated. A suggested change on line 7 of page 10 might be, "...the employer may require..." (permissive language) rather than "...the employer shall require..." (non-permissive language).*

7.)

*Further, we believe the right should be limited only to an employer being able to test its own employees under this provision and not request testing of other employees on the site.*

7.)

This bill creates a tremendous amount of administrative/regulatory requirements for an employer. Some of these requirements are certainly unavoidable, but the question needs to be asked if some of this can be accomplished without the red tape and paperwork.

*While we are inclined to believe the paperwork requirements are minimal and consistent with the other types of requirements already in place on public sector contracts, we remain open to any and all suggestions to minimize such requirements without affecting the intent of the bill.*

8.) The bill increases the costs for a contractor when bidding for a prevailing wage project. Depending on a number of factors, some contractors may not be able to bid for prevailing wage projects as a result of the bill. Could this lead to increased costs for local government construction projects? Are the costs to taxpayers worth the benefits on all projects?

*There is no question that the bill requires additional, up-front expenditures. It would be, in some regards, similar to a contractor contemplating the purchase of a new piece of equipment to bid a project. That too might be an impediment, but it may also improve the overall cost structure for completing the project. Study and study indicates that a substance abuse testing program provides benefits in the short and long-run on safety,*

worker's compensation, health insurance, productivity, morale, and more. We believe the bill will save money and advance existing state laws regarding the illegal use of drugs and alcohol.

- 9.) In order to comply with AB 682, contractors need access to testing facilities and consultants. Are there enough facilities and consultants in the state and at a cost effective price?

*We believe that there are adequate facilities, since most health care facilities can accept drug and alcohol samples. We also believe third-party administrators will step into this market to develop additional relationships with testing sites and labs and, in so doing, lower the cost to the contractors needing testing to comply with AB 682.*

- 10.) The bill raises a question of fairness because it would not apply to all workers on a prevailing wage project. Government employees for example might be working alongside the employees of the private contractor performing the same dangerous duties, but won't be tested under AB 682. Other private sector workers on the project not covered by the prevailing wage would also be exempt from the testing, but still offer serious safety risk.

*This is an issue that needs to be talked through. Certainly testing 100 percent of the people on the job should be the goal, but testing 95 percent and working toward 100 percent is better than testing 0 percent until all of the language can be worked out.*

- 11.) The bill grants DWD the right to inspect records relating to the drug/alcohol testing upon the complaint of "any person." The "any person" provision is broad and provides the opportunity for harassment of a contractor by hostile parties.

*We would recommend to the drafter that the "any person" language be modified to be "any person on the project." In addition, we would recommend to the drafter and to DWD that any complaint that is filed must be specific in nature. employee, employer*

- 12.) The bill contains some stiff penalties for violations of AB 682. Are these provisions too stiff for minor violations?

*The penalties come directly from prevailing wage. We could argue that a misrepresentation regarding compliance with a safety program that places others at risk is actually worse than a wage payment issue between an employer and its employees. We would suggest on line 5 of page 17 that the drafter include the word "willfully" to make the sentence read, "Any employer that willfully permits..." 211*  
*willfully?  
knowingly?  
middle ground  
not impossible  
high bar*

- 13.) The bill raises numerous liability questions for contractors bidding on prevailing wage projects. Is it possible to limit the liability or even eliminate some of the provisions that expose an employer to liability?

*The issues of liability are addressed in the answers to numbers 2, 5, 6, 11, and 12.*

14.) The bill defines a positive test for alcohol at .08 or more. The extremely dangerous nature of some construction activities would seem to warrant a lower level of alcohol to trigger a positive test. .04 CDL std.

*While we would agree that lower limits may be appropriate, we think that it would be better to modify the state's laws regarding DUI/DWI and mirror them, rather than create new standards of intoxication under the bill.*

15.) The bill sets a state requirement that would be associated with prevailing wage projects. Some supporters of the bill have suggested it would prevent local units of government from setting their own drug/alcohol requirements for prevailing wage projects. While local governments may chose to simply use the state law requirements, the bill doesn't appear to pre-empt local units of government from setting higher requirements that those established in the state law. uniform statewide std. - strict uniformity

We would request that the drafter address pre-emption and include all public sector owners under the provisions of the bill.

16.) Would the provisions of AB 682 have the potential of differing impacts across the state based on the rural or urban nature of a particular region? If so, can those impacts be limited or even offset in some way?

*Most state laws have differing impacts. Since testing is available throughout the state, we think compliance can be achieved across the state. It is a misconception to believe that drug and alcohol abuse is limited to the state's urban areas, so the benefits of the legislation will reach into every part of the state, proportionately to the amount of public sector work subject to the prevailing wage laws.*

Additional notes:

*A question was asked regarding the release of information regarding drug/alcohol tests and the relationship to HIPAA. That question is being researched by Michael Best & Friedrich.*

*In order to allow contractors additional time to comply with the bill and to allow for a full year of participation in a random testing program, we would recommend to the drafter that the effective date of the bill be the first day of the 19<sup>th</sup> month following passage, rather than the first day of the 13<sup>th</sup> month.*

DVD promulgate rules

USE  
HIPAA  
under  
we bill

CA state  
privacy  
law

→ onsite,  
→ medical  
facility



itoring exposure of employees to lead, asbestos, or other toxic or unhealthy materials in the workplace or in the performance of job responsibilities. Such screening or tests shall be limited to any rule or regulation issued pursuant thereto, unless prior written consent of the employee is obtained for other tests.

**Section 15. Employer Protection from Litigation.**

No cause of action is or shall be established for any person against an employer who has established a substance abuse program in accordance with this [Act], for any of the following:

- (a) Actions in good faith based on the results of a "positive" confirmed substance abuse test;
- (b) Failure to test for alcohol and other drugs, or failure to test for a specific drug or other controlled substance;
- (c) Failure to test for, or if tested for, failure to detect, any specific drug or other substance, any medical condition, or any mental, emotional, or psychological disorder or condition; or
- (d) Termination or suspension of any substance abuse prevention or testing program or policy.

**COMMENT**

Again, the goal of this legislation is to reduce alcohol and other drug abuse and their attendant harms in the workplace. It is not the intent of this [Act] to interfere with the work relationships between employers and employees. By establishing a rigorous standard for comprehensive private sector drug-free workplace programs and by attempting to reduce legal action that might otherwise arise in the absence of such rigorous testing, employee assistance and rehabilitation, education, training, and confidentiality standards, the Commission hopes to keep the focus of drug-free workplaces on reducing alcohol and other drug abuse and their attendant harms in the workplace. The Commission strongly encourages employers and employees to recognize the potential benefits of a drug-free workplace during the development and implementation of a rigorous, comprehensive drug-free workplace program and to work together towards achieving the goal of this legislation.

**Section 16. Causes of Action Based on Test Results.**

(a) No cause of action is or shall be established for any person against an employer who has established a substance abuse program in accordance with this [Act], unless the employer's action was based on a confirmed "false positive" test result, and the employer knew or clearly should have known that the result was in error, and ignored the true test result because of reckless, malicious, or negligent disregard for the truth and/or the willful intent to deceive or be deceived.

(b) In any claim, including a claim under this [Act], where it is alleged that an employer's action was based on a confirmed "false positive" test result:

- (1) There is a rebuttable presumption that the test result was valid if the employer complied with the provisions of this [Act], and;
- (2) The employer is not liable for monetary damages above and beyond any lost wages, benefits, and direct economic harm suffered by the employee if the employer's reliance on a "false positive" test result was reasonable and in good faith.

(c) There is no liability for any action taken related to a "false negative" substance abuse test.

**Section 17. Limits to Defamation Causes of Action.**

No cause of action for defamation of character, libel, slander, or damage to reputation is or shall be established for any person against an employer who has established a substance abuse program in accordance with this [Act], unless:

- (a) The results of that test were disclosed to a person other than the employer, an authorized employee, agent, or representative of the employer, the tested employee, or the tested prospective employee, or the authorized agent or representative of the employee;
- (b) The information disclosed was a "false positive" test result;
- (c) The "false positive" test result was disclosed with negligence or by intentional conduct;
- (d) All elements of an action for defamation of character, libel, slander, or damage to reputation as established by [cite relevant state libel, slander, and damage to reputation sections from state code, where applicable] or common law, are satisfied.

## Malaise, Gordon

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**From:** Jeff Beiriger [Jeff@pmsmca.com]  
**Sent:** Wednesday, May 12, 2004 10:37 AM  
**To:** Malaise, Gordon  
**Subject:** U.S. Department of Transportation- Office of the Secretary of Transportation- O



U.S. Department of  
Transportat...

Gordon,

Here is a link to the U.S. Department of Transportation and it's policy with regard to the interplay between DOT testing and HIPAA. Although this is specific to DOT testing, we are modeling after that program and I would suggest that the logic is the same (see bullet point #2), that drug/alcohol testing, "...differs significantly from health information covered by HIPAA rules."

<http://www.dot.gov/ost/dapc/main/QandAHIPAA05031.htm>

I faxed over the other information a few minutes ago regarding the employer protections.

Any questions, give me a call.

Jeff

Jeffrey J. Beiriger, CAE  
Executive Vice President  
MCA Wisconsin  
414.543.7622  
jeff@pmsmca.com

<<U.S. Department of Transportation- Office of the Secretary of Transportation- Office of Drug and Alcohol Policy and Compliance.url>>



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Office of the Secretary of Transportation

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### General Issue 05/03

**QUESTION:**

Under Department of Health and Human Services (HHS) Health Insurance Portability and Accountability Act of 1996 (HIPAA) rules, are employers and their service agents in the Department of Transportation (DOT) drug and alcohol testing program required to obtain employee written authorization in order to disclose drug and alcohol testing information?

**ANSWER:**

*= employee consent not necessary to release  
 b/c not medical records  
 b/c required under other law*

- No. HHS HIPAA rules do not require employers and service agents in the DOT drug and alcohol testing program to obtain written employee authorization to disclose drug and alcohol testing information required by 49 CFR Part 40 and other DOT agency drug and alcohol testing rules.
- DOT-required drug and alcohol testing information differs significantly from health information covered by HIPAA rules (45 CFR Part 164). The DOT program is concerned only with employees' compliance with DOT safety regulations, and not with preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care or the past, present, or future physical or mental health or condition of an individual.
- Even if DOT drug and alcohol testing information is viewed as protected health information under Part 164, however, it is not necessary, under §164.512(a), to obtain employee written authorization where <sup>or state</sup> Federal law requires the use or disclosure of otherwise protected health information.
- Use or disclosure of the DOT drug and alcohol testing information without a consent or authorization from the employee is required by the Omnibus Transportation Employees Testing Act of 1991, 49 CFR Part 40, and DOT agency drug and alcohol testing regulations, unless otherwise stipulated by 49 CFR Part 40.
- Consequently, 45 CFR §164.512 enables any employer or service agent in the DOT program to disclose the information without the employee's authorization. For example:
  - o Employers need no employee authorizations to conduct DOT tests.
  - o Collectors need no employee authorizations to perform DOT urine collections, to distribute Federal Drug Testing Custody and Control Forms, or to send specimens to laboratories.
  - o Screening Test Technicians and Breath Alcohol Technicians need no employee authorizations to perform DOT saliva or breath alcohol tests (as appropriate), or to report test results to employers.
  - o Laboratories need no employee authorizations to perform DOT drug and validity testing, or to report test results to Medical Review Officers (MRO).
  - o MROs need no employee authorizations to verify drug test results, to discuss alternative medical explanations with prescribing physicians and issuing pharmacists, to report results to employers, to confer with Substance Abuse Professionals (SAP) and evaluating physicians, or to report other medical information (see §40.327).
  - o SAPs need no employee authorizations to conduct SAP evaluations, to confer with employers, to confer with MROs, to confer with appropriate education and treatment providers, or to provide SAP reports to employers.

- o Consortia/Third Party Administrators need no employee authorizations to bill employers for service agent functions that they perform for employers or contract on behalf of employers.
- o Evaluating physicians need no employee authorizations to report evaluation information and results to MROs or to employers, as appropriate.
- HHS agrees that there is no conflict between the HIPAA rules and DOT requirements, and indicated in the preamble to Part 164 [65 Federal Register 82593-94; December 28, 2000].

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U.S. Department of Transportation, 400 7th Street, S.W., Washington D.C. 20590 Phone: 202-366-4000

[Privacy Policy](#)

✓ - Employee subject to random testing under any other state or federal law not subject to testing under bill

✓ - Each employer responsible only for testing its own employees  
(General not responsible for sub's compliance)

= may not prosecute general

= B.2  
Gen'l. of Compliance  
penalties - only its own employees, no others

✓ - 2 working days, not 5, to request retest

✓ - Employer protection from litigation - model act

✓ - Reasonable suspicion testing

P 10, § 7 shall to may - make it permissive

Also, may test own employees; may not request other employees to be tested

✓ - Inspection of records "any person" too broad  
= employer or project  
= "employer or representative"

= Complaint must be specific in nature

✓ - P 17, § 5 insert "willfully"

✓ - Alcohol - strict CDL std. .04 BAC

~~✓ - Do not prevent local govt from setting higher std.~~

~~= at least as strict~~

~~state agencies too?~~

✓ - Require local ordinances to be in strict conformity w/ state law

-0090/1

LRB-171431  
GMM:kmg:rs  
Wlj

DN of E

**2003 ASSEMBLY BILL 682**

Wed. 10/13

November 20, 2003 - Introduced by Representatives STONE, MILLER, LOTHIAN, MUSSER, HINES, ZEPNICK, ALBERS, M. LEHMAN, OTT, VRAKAS and NASS, cosponsored by Senators DARLING and PLALE. Referred to Committee on Labor

Regen

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.

\$186,000

\$38,000

a contractor, subcontractor, or agent (employer)

and providing a penalty

**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). <sup>has</sup>

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

and a statement from each subcontractor ~~and~~ <sup>or</sup> agent that will be performing work on the project that the subcontractor or agent has in place or will have in place, such a drug and alcohol testing program

**ASSEMBLY BILL 682**

employer may require the

participating in the random testing program

Must require the employee to submit to

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. (Not)

Complete determination of circumstances in which employee is required to submit to testing or other

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:

The bill however excludes from testing under the bill any employee who under any other state or federal law is required to submit to testing that is at least as strict as the testing under the bill

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.

**ASSEMBLY BILL 682**

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. two

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.

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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:*

all of the following: (a) A

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

16.855 (9m) The department shall require a bidder for a contract to perform construction work on a project of public works that is subject to s. 103.49 to submit with the bid a statement that the bidder, 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 s.

Insert A

knowingly

of the employer

on a form adopted by the department of workforce development

of administration

has



ASSEMBLY BILL 682

*(has twice)*  
on a form adopted by the department  
of workforce development

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 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 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).

Insert  
S-2

all of the  
following:  
P (a) A

Insert  
S-11

Insert  
S-20

ASSEMBLY BILL 682

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. (6)(a) to (e) at or above the minimum detection level specified in sub. (6)(a) 2.,  
13 (b) 2., (c) 2., (d) 2., or (e) 2. *the drugs or their metabolites specified in sub. (6)(a) to (e) or any other*

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~~ *for which testing is required by an employer under its drug and alcohol testing program under this section*

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.

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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. (a) to (e) at or above the minimum detection level specified in sub. (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

all of the following: (a) 10A

Insert 7-25

ff (b)

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:

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 or 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) (7)

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) (9)

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.

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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  
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

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## SECTION 4

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~~<sup>may</sup> on a project of public works that is subject  
7 to s. 66.0903, 103.49, or 103.50, the employer ~~shall~~<sup>may</sup> 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~~<sup>his</sup> 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,

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

*Not* During the life of the project, employees employed on the project who are participants in a random testing program described in par (a) shall be tested as provided in par (a).

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.

as provided in this paragraph

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

tested under this paragraph

7 to random testing. During the life of the project, not less than 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.

Insert  
11-12

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.

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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.



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8850235 (1g)(d)

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)~~ ~~(7)~~ (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 ~~1~~ <sup>2</sup> 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.

## ASSEMBLY BILL 682

## SECTION 4

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 (e) (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 (f) (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.

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1 <sup>(8)</sup> ~~(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).<sup>✓</sup>

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.

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11 <sup>(9)</sup> ~~(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 <sup>(b)</sup> Except as provided in par. (a) <sup>5</sup> 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.

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employee or ~~an designated~~ <sup>any</sup> representative of an employee

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

Insert 16-4

(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.

an employee of the employer

(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.

performing the work specified in s. 66.0903 (4), 103.49 (2m), or 103.50 (2m), or any representative of a person performing that work

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

Not A request under this paragraph shall specify the types of records requested.

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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 knowingly 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 (13) (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 knowingly found to have permitted an employee of the person 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 knowingly found to have permitted an employee of the person 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.

**ASSEMBLY BILL 682**

**SECTION 4**

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 <sup>knowingly</sup> permitted an employee <sup>of the business</sup> 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.

Inc 11  
 18-12 13

**SECTION 5. Nonstatutory provisions.**

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

**ASSEMBLY BILL 682**

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.**

4 (1) This act takes effect on the first day of the <sup>19<sup>th</sup></sup>~~13<sup>th</sup>~~ month beginning after  
5 publication.

6 (END)

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-0090/1dn  
GMM.....

Representative Stone:

This draft makes all of the following changes to 2003 AB 682:

1. The draft specifies that an employee who under any other state or federal law is subject to testing that is at least as strict as the testing required under the draft is not subject to testing under the draft. See s. 103.503 (5), as created by the draft.
2. To clarify that each contractor and subcontractor is responsible only for its own compliance with the draft, the draft requires each contractor and subcontractor to file separate bid statements and affidavits of compliance. See ss. 16.855 (9m), 66.0901 (10), 84.06 (2) (c), and 103.503 (2) and (10), as created by the draft.
3. The draft lowers from five to two the number of working days within which an employee may challenge the results of a test or request a retest. See s. 103.503 (3) (a) 8. and (7) (c), as created by the draft.
4. The draft provides that employers are immune from civil liability for actions taken in good faith, failures to test for or detect the presence of drugs or alcohol or any medical, mental, emotional, or psychological condition, and decisions to suspend or terminate a testing program. See s. 103.503 (8) (d), as created by the draft.
5. The draft makes reasonable suspicion testing permissive, not mandatory. See s. 103.503 (4) (b), as created by the draft.
6. The draft permits only an employee or his or her representative, and not anyone, to request inspection of an employer's records and requires such a request to specify the types of records requested. See s. 103.503 (11) (b), as created by the draft.
7. The draft subject an employer to criminal liability and debarment only if the employer *knowingly* permits an employee to work in violation of the draft. See s. 103.503 (12) (b) and (13) (a), (b), and (d), as created by the draft.
8. The draft lowers the alcohol impairment threshold from .10 to .04 by cross referencing s. 885.235 (1g) (d), rather than s. 340.01 (46m), in s. 103.503 (6) (f), as created by the draft.
9. The draft provides for statewide uniformity by requiring local drug and alcohol testing ordinances to strictly conform to the draft. See s. 103.503 (14), as created by the draft.



If you have any questions or comments about the draft, please do not hesitate to contact me directly at the phone number or e-mail address listed below.

Gordon M. Malaise  
Senior Legislative Attorney  
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GMM.....

(INSERT 5-2)

✓  
(b) A statement on a form adopted by the department of workforce development from each subcontractor ~~and~~ <sup>or</sup> agent that will be performing work on the project that the subcontractor or agent has in place, or will have in place before any work on the project commences, a drug and alcohol testing program that complies with s. 103.503. ✓

(END OF INSERT)

(INSERT 5-11)

✓  
(b) A statement on a form adopted by the department of workforce development from each subcontractor ~~and~~ <sup>or</sup> agent that will be performing work on the project that the subcontractor or agent has in place, or will have in place before any work on the project commences, a drug and alcohol testing program that complies with s. 103.503. ✓

(END OF INSERT)

(INSERT 5-20)

✓  
2. A statement on a form adopted by the department of workforce development from each subcontractor ~~and~~ <sup>or</sup> agent that will be performing work on the project that the subcontractor or agent has in place, or will have in place before any work on the project commences, a drug and alcohol testing program that complies with s. 103.503. ✓

(END OF INSERT)

(INSERT 7-25)

2. A statement on a form adopted by the department from each subcontractor and agent that will be performing work on the project that the subcontractor or agent has 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.

(END OF INSERT)

(INSERT 11-12)

(5) NONAPPLICABILITY. An employee or applicant who under any other state or federal law is required to submit to random drug and alcohol testing that is at least as strict as the testing required under this section is not required to submit to testing under this section.

(END OF INSERT)

(INSERT 15-10)

(d) No cause of action of any nature may arise against and no civil liability may be imposed upon an employer that has in place a drug and alcohol testing program that complies with this section for any of the following:

1. Any action taken in good faith based on a verified positive test result.
2. Any failure to test an employee or applicant for the presence of drugs or alcohol, for the presence of a specific drug, for any medical condition, or for any mental, emotional, or psychological condition.
3. Any failure to detect the presence of alcohol or any specific drug, any medical condition, or any mental, emotional, or psychological condition.

4. Any decision to suspend or terminate a drug or alcohol testing program.

(END OF INSERT)

16-4

(INSERT ~~15-40~~)

(10) COMPLIANCE. (a) When the department finds that an employer is not in compliance with this section, the department shall notify the employer and the state agency or local governmental unit authorizing the work of the noncompliance and shall file the determination with the employer and the state agency or local governmental unit within 30 days after the date of that notice.

(b) Upon completion of a project and before receiving final payment for his or her work on the project, each agent or subcontractor shall furnish the contractor with an affidavit stating that the agent or subcontractor has complied fully with the requirements of this section. A contractor may not authorize final payment until the affidavit is filed in proper form and order.

(c) Upon completion of a project and before receiving final payment for his or her work on the project, each contractor shall file with the state agency or local governmental unit authorizing the work an affidavit stating that the contractor has complied fully with the requirements of this section and that the contractor has received an affidavit under par. (b) from each of the contractor's agents and subcontractors. A state agency or local governmental unit may not authorize a final payment until the affidavit is filed in proper form and order. An employer that knowingly permits an employee of the employer 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 is subject to the penalties specified in sub. (12) and to debarment under sub. (13).

(END OF INSERT)

(INSERT 18-12)

(14) LOCAL ORDINANCES; STRICT CONFORMITY REQUIRED. A local governmental unit may enact an ordinance requiring an employee or applicant to submit to <sup>drug and</sup> alcohol ~~and drug~~ testing only if the ordinance strictly conforms to this section.

(END OF INSERT)

(INSERT A)

4. An employer that has in place a drug and alcohol testing program that complies with the bill is immune from civil liability for any action taken in good faith based on a verified positive test result; any failure to test an employee or applicant for the presence of drugs or alcohol, for the presence of a specific drug, for any medical condition, or for any mental, emotional, or psychological condition; any failure to detect the presence of alcohol or any specific drug, any medical condition, or any mental, emotional, or psychological condition; or any decision to suspend or terminate a drug or alcohol testing program.

(END OF INSERT)

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-0090/1dn  
GMM:wlj:rs

October 13, 2004

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