

104TH CONGRESS
1ST SESSION

H. R. 1706

To amend the Public Health Service Act to establish Federal standards to ensure quality assurance of drug testing programs for private employers, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 24, 1995

Mr. SOLOMON introduced the following bill; which was referred to the Committee on Commerce, and in addition to the Committee on Economic and Educational Opportunities, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the Public Health Service Act to establish Federal standards to ensure quality assurance of drug testing programs for private employers, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Quality Assurance in
5 Drug Testing Act”.

6 **SEC. 2. FINDINGS.**

7 Congress finds that—

1 (1) drug abuse in the workplace is a serious na-
2 tional problem, and

3 (2) drug testing can be an effective deterrent to
4 drug abuse when administered in a manner that pro-
5 vides for quality assurance.

6 **SEC. 3. QUALITY ASSURANCE IN DRUG TESTING.**

7 The Public Health Service Act (42 U.S.C. 201 et
8 seq.) is amended by adding at the end the following new
9 title:

10 **“TITLE XXVII—QUALITY**
11 **ASSURANCE IN DRUG TESTING**

12 **“SEC. 2701. LABORATORY CERTIFICATION STANDARDS.**

13 “(a) PROHIBITION.—No individual may perform a
14 toxicological analysis, for purposes of confirming a drug-
15 testing screen positive, in connection with any drug testing
16 program that is subject to this title unless such analysis
17 is conducted in a laboratory certified under subsection (b).

18 “(b) CERTIFICATION.—Not later than 1 year after
19 the date of enactment of this title, the Secretary shall es-
20 tablish a program for certifying laboratories that meet
21 standards for performing drug confirmatory tests.

22 “(c) CRITERIA.—In establishing standards for certifi-
23 cation under subsection (b), the Secretary shall use cri-
24 teria that will maximize the predictive value of the testing
25 scheme and that take into consideration the practices, pro-

1 cedures, and experience of drug testing programs which
2 the Secretary determines are conducted in accordance with
3 appropriate standards and procedures.

4 “(d) PERIODIC REVIEW.—At least once each year,
5 the Secretary shall review, and where appropriate revise,
6 the certification criteria established under subsection (b),
7 taking into consideration the relevant scientific technical
8 advances in the area of drug testing and revisions needed
9 to reflect employer zero-drug tolerance practices.

10 **“SEC. 2702. ANTI-DRUG ABUSE POLICY.**

11 “(a) WRITTEN POLICY.—As a condition of imple-
12 menting or maintaining a drug testing program, an em-
13 ployer shall establish a written anti-drug abuse policy that
14 shall contain, at a minimum, an explanation concerning
15 the—

16 “(1) circumstances under which a drug test will
17 be administered, the procedures for notifying an em-
18 ployee of a confirmed positive result, and a state-
19 ment the policy will be administered in a consistent
20 and nondiscriminatory manner without regard to
21 whether the employee is employed in a management
22 or hourly capacity,

23 “(2) safeguards established for protecting the
24 privacy of individuals who are subject to testing, in-

1 cluding chain custody procedures and the limitations
2 on disclosure of the results of drug tests,

3 “(3) availability of any drug abuse treatment
4 program,

5 “(4) penalties that may be imposed for a viola-
6 tion of the anti-drug policy of the employer, and

7 “(5) procedures under which an applicant or
8 employee shall be given a reasonable opportunity to
9 explain a confirmed positive test result.

10 “(b) NOTICE.—An employer shall make a reasonable
11 effort to provide notice of the written anti-drug abuse pol-
12 icy to applicants and employees subject to testing using
13 whatever methods the employer determines to be appro-
14 priate.

15 **“SEC. 2703. DRUG-FREE AWARENESS PROGRAM.**

16 “In order for an employer to be permitted to imple-
17 ment or maintain a drug testing program, such employer
18 shall establish, as part of such drug testing program, a
19 drug-free awareness program designed to inform its em-
20 ployees concerning—

21 “(1) the dangers of drug abuse, both inside and
22 outside of the workplace,

23 “(2) the policy of the employer of maintaining
24 a drug-free workplace,

1 “(3) information as to the existence and avail-
2 ability of counseling, employee assistance, rehabilita-
3 tion, and other drug abuse treatment programs of
4 which the employer is aware, and

5 “(4) the penalties that may be imposed on ap-
6 plicants and employees who test positive for the use
7 of a drug, and for the manufacture, distribution, dis-
8 pensation, possession, or use of a drug in the work-
9 place of the employer.

10 **“SEC. 2704. STANDARDS FOR DRUG TESTING.**

11 “(a) APPLICANTS.—Nothing in this title shall be con-
12 strued to prohibit an employer from requiring, as a condi-
13 tion of employment, that an applicant submit to and pass
14 a drug test based on criteria established by the employer
15 that is designed to achieve a drug-free workplace. Refusal
16 by an applicant to submit to such a test may be treated
17 in the same manner as a failure to pass a drug test.

18 “(b) EMPLOYEES.—Nothing in this title shall be con-
19 strued to prohibit an employer from requiring an employee
20 to submit to and pass a drug test—

21 “(1) where the employer has reasonable sus-
22 picion to believe that the employee is using or under
23 the influence of a drug, or has otherwise violated the
24 employer’s substance-abuse prevention policy,

1 “(2) where such test is administered as part of
2 a routine scheduled or periodic medical examination,

3 “(3) in the case of an accident or incident in-
4 volving the actual or potential loss of human life, se-
5 rious bodily injury, or significant property or envi-
6 ronmental damage,

7 “(4) during and for a reasonable period of time
8 (not to exceed 5 years) after the completion of a
9 drug abuse treatment program, or

10 “(5) pursuant to a random drug testing pro-
11 gram whereby all employees subject to random drug
12 testing have an equal chance of initial selection and
13 are selected according to a method of selection which
14 is neutral and nondiscriminatory in nature, and that
15 all employees in the work unit covered by the ran-
16 dom drug-testing policy are included in the testing
17 program.

18 **“SEC. 2705. EMPLOYEE PROTECTIONS.**

19 “(a) PROHIBITIONS.—In the case of an applicant or
20 employee, it shall be a violation of this title—

21 “(1) for an employer to fail to make reasonable
22 efforts to inform the applicant or employee as to the
23 drug testing policy of the employer,

1 “(2) for an employer to take any adverse action
2 based on the unconfirmed positive results of a drug
3 test, except as provided in subsection (c),

4 “(3) for an employer, on the request of an ap-
5 plicant or employee, to fail to provide such applicant
6 or employee with a reasonable opportunity to be in-
7 formed of a confirmed positive drug test result, and

8 “(4) for an employer, on the request of an ap-
9 plicant or employee, to fail to provide such applicant
10 or employee with a reasonable opportunity to explain
11 the results of a confirmed positive test result.

12 “(b) ANTIRETALIATION PROHIBITION.—It shall be a
13 violation of this title for an employer to take retaliatory
14 action against an employee because of the exercise by the
15 employee of any right granted or protected under this title.

16 “(c) EXCEPTION FOR SENSITIVE EMPLOYEES.—
17 Pending the receipt of the results of a confirmatory drug
18 test, an employer may transfer or reassign an employee
19 in a sensitive position to another area or position without
20 any loss in compensation to such employee if the initial
21 drug test result is positive. If the confirmatory test of such
22 employee is negative, such employee shall be entitled to
23 immediate reinstatement to the position from which such
24 employee has been transferred or reassigned. If the con-
25 firmatory test of such employee is positive, and the em-

1 ployee is in a sensitive position wherein an accident could
2 cause loss of human life, serious bodily injury, or signifi-
3 cant property or environmental damage, the employer may
4 permanently remove the employee from the sensitive posi-
5 tion and transfer or reassign the employee to an available
6 nonsensitive position with comparable pay and benefits, or
7 may take other action, including termination or other ad-
8 verse employment action, consistent with the employer's
9 policy for drug-test positives for employees in sensitive po-
10 sitions, provided there are not applicable contractual pro-
11 visions that expressly prohibit such action.

12 **“SEC. 2706. CONFIDENTIALITY.**

13 “(a) IN GENERAL.—An individual, other than the ap-
14 plicant or employee who is the subject of a drug test, shall
15 not disclose information obtained as a result of a drug
16 test, except as provided in subsection (b).

17 “(b) PERMITTED DISCLOSURES.—An employer, or
18 individual conducting a drug test on behalf of an em-
19 ployer, may disclose information acquired from a drug test
20 only to—

21 “(1) the applicant or employee taking such
22 drug test or any other individual specifically des-
23 igned in writing by such applicant or employee
24 taking such drug test,

1 “(2) the employer, including the designated rep-
2 resentatives of such employer, that requested such
3 test,

4 “(3) any court, governmental agency, arbitra-
5 tor, or mediator, in accordance with Federal or
6 State law, and

7 “(4) appropriate drug abuse treatment provid-
8 ers.

9 **“SEC. 2707. EMPLOYER PRACTICES.**

10 “(a) SAFE WORKPLACE.—Nothing in this title shall
11 be construed to prohibit an employer from taking action
12 necessary to ensure a safe workplace.

13 “(b) DRUG-FREE WORKPLACE.—Nothing in this title
14 shall be construed to prohibit an employer from taking ac-
15 tion necessary, up to and including termination, in the
16 case of applicant or employee—

17 “(1) whose drug test result is confirmed posi-
18 tive,

19 “(2) who refuses to take a drug test authorized
20 under this title, or

21 “(3) who tampers with, adulterates, or sub-
22 stitutes for, or attempts to tamper with, adulterate,
23 or substitute for a drug testing specimen.

24 “(c) PARTICIPATION IN DRUG ABUSE TREATMENT
25 PROGRAM.—Nothing in this title shall be construed to

1 prohibit an employer from requiring an employee to par-
2 ticipate in, and satisfactorily complete, a drug treatment
3 program as a condition of continued employment where
4 the employee has tested confirmed positive for drugs, has
5 refused to submit to a drug test, or has tampered with,
6 adulterated, or substituted for, or attempted to tamper
7 with, adulterate, or substitute for a drug test specimen.

8 **“SEC. 2708. DRUG ABUSE TREATMENT PROGRAMS.**

9 “As part of the drug-free awareness program estab-
10 lished pursuant to section 2703, employers shall provide
11 information to employees concerning the existence and
12 availability of public and private drug counseling, em-
13 ployee assistance, rehabilitation, and other drug abuse
14 treatment programs of which the employer is aware.

15 **“SEC. 2709. REGULATIONS.**

16 “Not later than 1 year after the date of enactment
17 of this title, the Secretary shall—

18 “(1) establish a program for the certification of
19 laboratories for the performance of toxicological
20 drug analysis conducted for drug testing programs
21 as described in this title, and

22 “(2) issue such other rules and regulations as
23 may be necessary or appropriate to carry out this
24 title.

1 **“SEC. 2710. ENFORCEMENT AND RELIEF.**

2 “(a) LABORATORY CERTIFICATION STANDARDS.—

3 The certification program established pursuant to section
4 2701(b) shall be enforced in accordance with the proce-
5 dures and sanctions contained in subsections (g), (h), (i),
6 (j), (k), and (l) of section 353.

7 “(b) EMPLOYEE COMPLAINTS CHARGING UNLAWFUL
8 DISCHARGE OR DISCRIMINATION; INVESTIGATION ORDER.

9 “(1) COMPLAINT.—An employee who believes
10 that such employee has been charged or otherwise
11 discriminated against by an employer in violation of
12 this title may, not later than 30 days after such ac-
13 tion occurs, file (or have any individual file on behalf
14 of such employee) a complaint with the Secretary of
15 Labor (hereinafter referred to in this subsection as
16 the ‘Secretary’) alleging that such discharge or dis-
17 crimination violates this title. On receipt of such
18 complaint, the Secretary shall notify the employer
19 and its designated representatives named in the
20 complaint of such filing.

21 “(2) INVESTIGATION AND ORDER.—

22 “(A) INVESTIGATION.—On receipt of a
23 complaint filed under paragraph (1), the Sec-
24 retary shall conduct an investigation of the vio-
25 lation alleged in such complaint. Not later than
26 30 days after the receipt of such complaint, the

1 Secretary shall complete such investigation and
2 shall notify in writing the employer (and any in-
3 dividual acting on behalf of the employer) as to
4 the results of such investigation.

5 “(B) ORDER.—Not later than 30 days
6 after the completion of such investigation, the
7 Secretary shall, unless the proceeding on the
8 complaint is terminated by the Secretary on the
9 basis of a settlement entered into by the Sec-
10 retary and the employer alleged to have com-
11 mitted such violation, issue an order either pro-
12 viding the relief prescribed in this section or de-
13 nying the complaint. An order of the Secretary
14 issued under this subparagraph shall be made
15 on the record after notice and opportunity for
16 public hearing.

17 “(3) RELIEF.—If, in response to a complaint
18 filed under paragraph (1), the Secretary determines
19 that a violation of this title has occurred, the Sec-
20 retary shall order the employer who committed such
21 violation to provide such suitable relief as the Sec-
22 retary determines appropriate, including reinstatement,
23 promotion, and the payment of lost wages and
24 benefits.

1 “(4) REVIEW OR ORDER.—An employee or em-
2 ployer adversely affected or aggrieved by an order is-
3 sued under paragraph (2) may obtain review of such
4 order in the United States Court of Appeals for the
5 circuit in which the violation, with respect to which
6 the order was issued, allegedly occurred. The peti-
7 tion for review shall be filed not later than 60 days
8 after the issuance of the order of the Secretary
9 under paragraph (2). Review by the Court of Ap-
10 peals shall conform to chapter 7 of Title 5, United
11 States Code.

12 “(5) FAILURE TO COMPLY.—If an employee or
13 employer fails to comply with an order issued under
14 paragraph (2), the Secretary may file a civil action
15 in the United States court for the district in which
16 the violation was found to occur to enforce such
17 order. Such court, in issuing any final order under
18 this subsection, may award the costs of litigation
19 (including reasonable attorney and expert witness
20 fees) to the prevailing party.

21 “(c) EMPLOYER PROTECTION FROM LITIGATION.—
22 No cause of action is or shall be established under this
23 title for any person against an employer who has estab-
24 lished a policy and initiated a drug testing program in ac-
25 cordance with this title, for any of the following:

1 “(1) Actions in good faith based on the results
2 of a ‘positive’ drug test.

3 “(2) Failure to test for drugs, or failure to test
4 for a specific drug or other controlled substance.

5 “(3) Failure to test for, or if tested for, failure
6 to detect, any specific drug or other substance, any
7 medical condition, or any mental, emotional, or psy-
8 chological disorder or condition.

9 “(4) Termination or suspension of any sub-
10 stance abuse prevention or testing program or pol-
11 icy.

12 “(d) CAUSES OF ACTION BASED ON TEST RE-
13 SULTS.—

14 “(1) No cause of action is or shall be estab-
15 lished for any person against an employer who has
16 established a program of drug testing in accordance
17 with this title, unless the employer’s action was
18 based on a ‘false positive’ drug-test result, and the
19 employer knew or clearly should have known that
20 the result was in error, and ignored the true test re-
21 sult because of reckless, malicious, or negligent dis-
22 regard for the truth and/or the willful intent to de-
23 ceive or be deceived.

1 “(2) In any claim, including a claim under this
2 title, where it is alleged that an employer’s action
3 was based on a ‘false positive’ test result—

4 “(A) there is a rebuttable presumption
5 that the test result was valid if the employer
6 complied with the provisions of this title; and

7 “(B) the employer is not liable for mone-
8 tary damages if its reliance on a ‘false positive’
9 test result was reasonable and in good faith.

10 “(3) There is no employer liability for any ac-
11 tion taken related to a ‘false negative’ drug test.

12 “(e) LIMITS TO DEFAMATION CAUSES OF ACTION.—
13 No cause of action for defamation of character, libel, slan-
14 der, or damage to reputation is or shall be established for
15 any person against an employer who has established a pro-
16 gram of drug testing in accordance with this title, un-
17 less—

18 “(1) the results of that test were disclosed to a
19 person other than the employer, an authorized em-
20 ployee, agent, or representative of the employer, the
21 tested employee, or the tested prospective employee,
22 or the authorized agent or representative of the em-
23 ployee;

24 “(2) the information disclosed was a ‘false posi-
25 tive’ test result;

1 “(3) the ‘false positive’ test result was disclosed
2 with negligence; and

3 “(4) all elements of an action for defamation of
4 character, libel, slander, or damage to reputation as
5 established by applicable statute or common law, are
6 satisfied.

7 “(f) CONSTRUCTION.—Nothing in this title shall be
8 construed to require an employer to establish a drug test-
9 ing program for applicants or employees or make employ-
10 ment decisions based on such test results.

11 **“SEC. 2711. EFFECT ON OTHER LAWS.**

12 “(a) STATE LAW.—This title shall preempt any State
13 or local law, rule, regulation, order or standard that ap-
14 plies to the drug testing of an applicant or employee, or
15 that relates to any matter addressed under this title. No
16 State or local government shall adopt or enforce any law,
17 rule, regulation, ordinance, standard or order relating
18 to—

19 “(1) the certification of laboratories that per-
20 form drug testing analysis with respect to such anal-
21 ysis,

22 “(2) requirements for the conduct of drug test-
23 ing under the certification program established
24 under this title,

1 “(3) the conducting of employee or applicant
2 drug testing programs, or

3 “(4) any other matter relating to this title.

4 “(b) OTHER FEDERAL LAWS.—Nothing in this title
5 shall be construed to prohibit the Departments of Trans-
6 portation, Energy, or Defense, or the Nuclear Regulatory
7 Commission, or other Federal agencies with authority over
8 regulated industries or government contractors from issu-
9 ing regulations with respect to drug and alcohol testing.
10 This title shall preempt any Federal law, rule, regulation,
11 order, or standard that applies to the continued employ-
12 ment or reemployment in a sensitive position of a recover-
13 ing drug addict or chronic drug abuser, or the reinstate-
14 ment or rehiring of any employee in a sensitive position
15 for whom an employer has administered a drug-test con-
16 sistent with this title that has produced a confirmed posi-
17 tive drug-test result.

18 **“SEC. 2712. EFFECTIVE DATE.**

19 “‘This title shall become effective 1 year after the date
20 of enactment of this title, and the prohibition contained
21 in section 2701(a) shall not take effect less than 1 year
22 after establishment of the certification program required
23 under section 2701(b).

24 **“SEC. 2713. DEFINITIONS.**

25 “‘As used in this title:

1 “(1) APPLICANT.—The term ‘applicant’ means
2 any individual who has submitted an application to
3 an employer, whether written or oral, for employ-
4 ment with such employer.

5 “(2) DRUG.—The term ‘drug’ means any con-
6 trolled substance listed in Scheduled I through V of
7 section 202 of the Controlled Substances Act (21
8 U.S.C. 812), alcohol, steroids, and any other drug or
9 medication that can interfere with employment per-
10 formance.

11 “(3) DRUG ABUSE TREATMENT PROGRAM.—
12 The term ‘drug abuse treatment program’ means a
13 program, such as an employee assistance program,
14 designed to assist an individual in dealing with prob-
15 lems caused by drug abuse.

16 “(4) DRUG TEST.—The term ‘drug test’ means
17 any test procedure used to take and analyze blood,
18 breath, hair, urine or other body fluids or materials
19 for the purpose of detecting the presence or absence
20 of a drug or its metabolites.

21 “(5) DRUG TESTING PROGRAM.—The term
22 ‘drug testing program’ means a drug testing pro-
23 gram established by an employer.

24 “(6) EMPLOYEE.—The term ‘employee’ means
25 an individual employed by an employer.

1 “(7) EMPLOYER.—The term ‘employer’ means
2 an individual, partnership, corporation, association,
3 or other nongovernmental entity that employs one or
4 more employees, and that is engaged in an industry
5 affecting commerce.

6 “(8) SENSITIVE EMPLOYEE.—The term ‘sen-
7 sitive employee’ means an individual employed in a
8 position whose duties, as defined by the employer,
9 involve responsibilities affecting such matters as na-
10 tional security, health, safety, environment, or other
11 responsibilities requiring a high degree of trust and
12 confidence.

13 **“SEC. 2714. PROFESSIONAL ATHLETES.**

14 “For purposes of this title, professional athletes may
15 be treated in the same manner as employees who meet
16 the definition of section 2714(g), except that professional
17 athletes shall not be covered by section 2706(a).”.

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