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H.101

Introduced by Representatives Van Wyck of Ferrisburgh, Batchelor of Derby,  
Christie of Hartford, Dickinson of St. Albans Town, Higley of  
Lowell, Hubert of Milton, Lawrence of Lyndon, Lewis of  
Berlin, Morrissey of Bennington, Rosenquist of Georgia,  
Savage of Swanton, Smith of Derby, Smith of New Haven,  
Strong of Albany, and Viens of Newport City

Referred to Committee on

Subject: Labor; employer's liability and workers' compensation; drug-free  
workplace

Statement of purpose of bill as introduced: This bill proposes to create a  
program for employers to adopt voluntarily a drug-free workplace program  
that will entitle them to a five percent discount on their workers' compensation  
premiums.

An act relating to drug-free workplace workers' compensation premium  
reductions

1 It is hereby enacted by the General Assembly of the State of Vermont:

2 Sec. 1. 21 V.S.A. § 712 is added to read:

3 § 712. DRUG-FREE WORKPLACE PROGRAM

4 (a) As used in this section:

5 (1) “Chain of custody” means the methodology of tracking specimens  
6 for the purposes of maintaining control and accountability from initial  
7 collection to final disposition of the specimens and providing for  
8 accountability during handling, testing, and storing specimens and reporting  
9 test results.

10 (2) “Confirmation test” means a second analytical procedure used to  
11 identify the presence of a specific drug or metabolite in a specimen. The  
12 confirmation test must be different in scientific principle from the initial test  
13 procedure and must be capable of providing requisite specificity, sensitivity,  
14 and quantitative accuracy.

15 (3) “Drug” means a drug listed or classified by the U.S. Drug  
16 Enforcement Administration as a Schedule I drug or its metabolites, and  
17 alcohol. The term “drug” also means other substances or their metabolites that  
18 are likely to cause the impairment or intoxication of an individual on the job,  
19 including amitriptyline, amphetamines, barbiturates, benzodiazepines,  
20 cannabinoids, cocaine, doxepin, glutethimide, hydromorphone, imipramine,  
21 meperidine, methadone, methaqualone, opiates, oxycodone, pentazocine,

1 phenytoin, phencyclidine, phenothiazines, and propoxyphene. As used in this  
2 subdivision, “alcohol” has the same meaning as in 7 V.S.A. § 2.

3 (4) “Drug test” means the procedure of taking and analyzing a specimen  
4 of body fluids or materials from the body for the purpose of detecting the  
5 presence of a drug, including an initial drug test and a confirmation test.

6 (5) “Employee assistance program” means a program capable of  
7 providing expert assessment of employee personal concerns; confidential and  
8 timely identification services with regard to employee drug or alcohol abuse;  
9 referrals of employees for appropriate diagnosis, treatment, and assistance; and  
10 follow-up services for employees who participate in the program or require  
11 monitoring after returning to work. If, in addition to those activities, an  
12 employee assistance program provides diagnostic and treatment services to an  
13 employer, these services shall in all cases be provided by the program.

14 (6) “Initial drug test” means a sensitive, rapid, and reliable procedure to  
15 identify negative and presumptive positive specimens. All initial tests shall  
16 use an immunoassay or equivalent procedure, or shall use a more accurate  
17 scientifically accepted method approved by the federal Department of Health  
18 and Human Services National Laboratory Certification Program or the College  
19 of American Pathologists as more accurate technology becomes available in a  
20 cost-effective form.

1           (7) “Job applicant” means an individual seeking or being sought for  
2           employment with an employer, who has been offered employment conditioned  
3           upon successfully passing a drug test or has begun work pending the results of  
4           a drug test.

5           (8) “Medical review officer” means a licensed physician trained in the  
6           field of drug and alcohol testing who provides medical assessment of positive  
7           test results, requesting re-analysis if necessary, and makes an actual  
8           determination as to whether alcohol or other drug use has occurred.

9           (9) “Nonprescription medication” means a drug or medication  
10           authorized pursuant to federal or State law for general distribution or use  
11           without a prescription in the treatment of human disease, illness, or injuries.

12           (10) “Prescription medication” means a drug or medication that is  
13           lawfully prescribed by a physician for use by an individual and taken in  
14           accordance with that prescription.

15           (11) “Reasonable suspicion drug testing” means drug testing that is  
16           conducted based on evidence that an employee is using or has used drugs in  
17           violation of an employer’s policy drawn from specific objective and articulable  
18           facts and reasonable inferences drawn from those facts in light of experience.  
19           Among other things, facts and inferences with respect to an employee may be  
20           based upon:

1           (A) observable phenomena while at work, including direct  
2           observation of drug use or physical symptoms of being under the influence of a  
3           drug;

4           (B) abnormal conduct or erratic behavior while at work or a  
5           significant deterioration in work performance;

6           (C) a credible report of substance abuse;

7           (D) evidence that an employee has tampered with a drug test during  
8           his or her employment with the employer;

9           (E) information that an employee has caused or contributed to an  
10          accident while at work; and

11          (F) evidence that an employee has manufactured, sold, distributed,  
12          solicited, possessed with intent to sell or distribute, used, or transferred drugs  
13          while working or while on the employer's premises or while operating the  
14          employer's vehicle, machinery, or equipment.

15          (12) "Specimen" means tissue, breath, hair, urine, or other product of  
16          the human body capable of revealing the presence of drugs that the  
17          Commissioner of Health has determined to meet the requisite standards for  
18          scientific and technical accuracy for drug testing and to afford the opportunity  
19          for strict forensic chain of custody procedures.

20          (13) "Threshold detection level" means the level at which the presence  
21          of a drug can reasonably be expected to be detected by a drug test performed

1 by a laboratory. A threshold detection level indicates the level at which a  
2 laboratory can conclude that a drug is present in an employee's specimen.

3 (b)(1) An employer may elect to implement a drug-free work place  
4 program pursuant to this section. Any employer that implements and  
5 maintains a drug-free workplace program that complies with this section shall  
6 receive a five percent discount on the employer's workers' compensation  
7 insurance policy premium for that workplace.

8 (2) An employer is not required maintain a drug-free workplace  
9 program pursuant to this section or to request that an employee or job applicant  
10 undergo drug testing. An employer that elects not to maintain a drug-free  
11 workplace program pursuant to this section shall be ineligible for the discount  
12 on the employer's workers' compensation insurance policy premium. Nothing  
13 in this section shall prevent an employer from maintaining a drug-free  
14 workplace program that is broader in scope than the program provided for by  
15 this section.

16 (3) An employer that qualifies for and receives discounts provided under  
17 this section must annually certify its compliance with this section to their  
18 workers' compensation insurer and the Department of Labor on a form  
19 provided by the Commissioner of Labor.

1           (4) The Commissioner of Labor, in consultation with the Commissioner  
2           of Financial Regulation and Commissioner of Health, may adopt rules and  
3           regulations necessary to implement and enforce this section.

4           (c) An employer that elects to participate in the drug-free workplace  
5           program under this section may test an employee or job applicant for any drug.  
6           A drug-free workplace program adopted pursuant to this section shall have the  
7           following elements:

8           (1) a written policy statement as provided in subsection (d) of this  
9           section;

10           (2) an employee assistance program or rehabilitation resources as  
11           provided in subsection (e) of this section;

12           (3) drug testing as provided in subsection (f) of this section;

13           (4) an employee education program as provided in subsection (l) of this  
14           section; and

15           (5) supervisor training as provided in subsection (m) of this section.

16           (d)(1) An employer that elects to participate in the drug-free workplace  
17           program under this section shall provide a written statement detailing its  
18           substance abuse and drug testing policy. At least one time prior to testing, and  
19           each subsequent year, an employer shall give all employees and job applicants  
20           written notice of testing and a copy of the employer's substance abuse and  
21           drug testing policy. The policy shall contain the following information:

1           (A) a general statement of the employer's policy on substance abuse  
2           and drug testing that:

3                   (i) notifies employees that the unlawful manufacture, sale,  
4                   distribution, solicitation, possession with intent to sell or distribute, or use of  
5                   alcohol or other drugs is prohibited in the workplace;

6                   (ii) identifies the types of testing to which an employee or job  
7                   applicant may be required to submit and the criteria used to determine when  
8                   such testing will be required; and

9                   (iii) identifies the actions the employer may take against an  
10                  employee or job applicant on the basis of a positive, confirmed test result;

11                  (B) a statement advising an employee or job applicant of his or her  
12                  rights pursuant to this section;

13                  (C) a statement concerning confidentiality;

14                  (D) a statement advising the employee or job applicant of the  
15                  consequences of a refusal to submit to a drug test;

16                  (E) a statement advising an employee or job applicant of the  
17                  employee assistance program, external employee assistance program, or the  
18                  employer's resource file of employee assistance programs and other persons,  
19                  entities, or organizations available to assist employees with personal or  
20                  behavioral problems;

1           (F) a statement that an employee or job applicant who receives a  
2           positive, confirmed test result may contest or explain the result to the employer  
3           within five working days after written notification of the positive test result;

4           (G) a statement informing an employee of the provisions of the  
5           federal Drug-Free Workplace Act, if applicable to the employer;

6           (H) a statement regarding any applicable collective bargaining  
7           agreement, including any right to appeal or grieve a positive test result or  
8           resulting employment action pursuant to the collective bargaining  
9           agreement; and

10           (I) a statement notifying the employee or job applicant of his or her  
11           right to consult with a medical review officer for technical information  
12           regarding prescription and non-prescription medication that he or she may be  
13           taking.

14           (2) An employer that adopts a drug-free workplace program pursuant to  
15           this section shall provide its employees with 60 days' notice before it  
16           implements the program and commences drug testing.

17           (3) An employer shall provide notice of its drug-free workplace program  
18           on all announcements of a vacant position for which drug testing is required.

19           (4) An employer shall post a notice of the employer's drug-testing  
20           policy in a conspicuous location on the employer's premises, and copies of the  
21           policy must be made available for inspection by the employees or job

1 applicants of the employer during regular business hours in the employer's  
2 personnel office or other suitable locations.

3 (e)(1) If an employer has an employee assistance program, the employer  
4 must inform the employee of the benefits and services of the employee  
5 assistance program. An employer shall post notice of the employee assistance  
6 program in conspicuous places in the workplace, including information  
7 regarding the employees' rights to access and utilize the program.

8 (2) If an employer does not have an employee assistance program, the  
9 employer must maintain a resource file of employee assistance service  
10 providers, licensed alcohol and drug abuse programs, mental health providers,  
11 and other persons, entities, or organizations available to assist employees with  
12 personal or behavioral problems. The employer shall provide all employees  
13 information about the existence of the resource file and a summary of the  
14 information contained within the resource file. The summary should contain  
15 information necessary to access the services listed in the resource file. In  
16 addition, the employer shall post a listing of multiple employee assistance  
17 providers in the area in conspicuous places throughout the workplace.

18 (f) An employer that elects to participate in the drug-free workplace  
19 program under this section shall conduct drug testing as provided by this  
20 subsection and any rules or regulations adopted by the Commissioner of Labor.

1 An employer participating in the drug-free workplaces program shall conduct  
2 the following types of drug tests:

3 (1) Job applicant drug testing. An employer shall require job applicants  
4 to submit to a drug test and may refuse to hire a job applicant because the  
5 applicant refuses to submit to a drug test or his or her drug test returns a  
6 positive, confirmed test result.

7 (2) Reasonable-suspicion drug testing. An employer shall require all  
8 employees to submit to reasonable-suspicion drug testing.

9 (3) Routine fitness-for-duty drug testing. An employer shall require  
10 employees to submit to a drug test if the test is conducted as part of a routinely  
11 scheduled employee fitness-for-duty medical examination that is part of the  
12 employer's established policy or that is scheduled routinely for all members of  
13 an employment classification or group.

14 (4) Follow-up drug testing. If an employee in the course of employment  
15 with the employer enters an employee assistance program for drug-related  
16 problems, or a drug rehabilitation program, the employer shall require the  
17 employee to submit to a drug test as a follow-up to the program. However, if  
18 an employee voluntarily entered the program, the employer may elect not to  
19 require follow-up testing. Follow-up testing must be conducted at least once a  
20 year for two years after the employee completes the program. The employee  
21 shall not be provided with advance notice of follow-up testing.

1           (5) Post-Accident testing. If an employee has caused or contributed to  
2           an accident during the course of employment, the employer must conduct a  
3           post-accident drug test of the employee.

4           (g) All specimen collection and testing under this section shall be  
5           performed in accordance with the following procedures:

6           (1) A specimen shall be collected in accordance with the specimen  
7           collection procedures established by the Commissioner of Health.

8           (2) A specimen shall be collected in a manner that protects the privacy  
9           of the employee or job applicant providing the specimen, and in a manner  
10          reasonably calculated to prevent substitution or contamination of the specimen.

11          (3) Specimen collection, storage, and transportation to the testing site  
12          shall be performed in a manner that will reasonably preclude specimen  
13          contamination or adulteration.

14          (4) An employee or job applicant shall have an opportunity to provide  
15          notification of any information that may be relevant to the test, including  
16          identification of currently or recently used prescription or nonprescription  
17          drugs, or other relevant medical information. This may be accomplished by  
18          providing procedures for review by a medical review officer in the case of a  
19          specimen that produces a positive, confirmed test result.

20          (5) Each initial drug test and confirmation test conducted under this  
21          section, not including the taking or collecting of a specimen to be tested, shall

1 be conducted by a laboratory certified by the federal Department of Health and  
2 Human Service's National Laboratory Certification Program or the College of  
3 American Pathologists, or, with respect to alcohol, conducted in accordance  
4 with U.S. Department of Transportation's regulations relating to alcohol  
5 testing.

6 (6) A specimen for a test may be taken or collected by any of the  
7 following persons:

8 (A) a physician, a physician's assistant, a registered professional  
9 nurse, a licensed practical nurse, a nurse practitioner, or a certified paramedic  
10 who is present at the scene of an accident for the purpose of rendering  
11 emergency medical service or treatment;

12 (B) a qualified individual certified or employed by a laboratory  
13 certified by the federal Department of Health and Human Service's National  
14 Laboratory Certification Program or the College of American Pathologists; or

15 (C) a qualified individual certified or employed by a specimen  
16 collection company.

17 (7) Within seven working days after receipt of a positive, confirmed test  
18 result from a laboratory, an employer shall inform an employee or job  
19 applicant in writing of the positive test result, the consequences of the result,  
20 and the options available to the employee or job applicant.

1           (8) The employer shall provide the employee or job applicant with a  
2           copy of the test results upon request.

3           (9) An initial drug test with a positive result must be verified by a  
4           confirmation test, or it shall be certified as a negative result.

5           (10) An employer who performs drug testing or specimen collection  
6           shall use chain of custody procedures to ensure proper record keeping,  
7           handling, labeling, and identification of all specimens to be tested.

8           (11) An employer shall pay the cost of all initial drug tests and  
9           confirmation tests that the employer requires of employees or job applicants.

10           (12) An employee or job applicant shall pay the cost of any additional  
11           tests that he or she requests.

12           (13) If testing is conducted based on reasonable suspicion, the employer  
13           shall promptly detail in writing the circumstances that formed the basis of the  
14           determination that reasonable suspicion existed to warrant the testing. A copy  
15           of this documentation shall be given to the employee or job applicant and the  
16           original documentation shall be kept confidential by the employer pursuant to  
17           subsection (n) of this section and retained by the employer for at least one year,  
18           or maintained throughout the duration of any legal proceedings resulting from  
19           the testing.

20           (h) No laboratory may analyze initial drug test or confirmation test  
21           specimens unless:

1           (1) the laboratory is approved by the National Laboratory Certification  
2           Program or the College of American Pathologists;

3           (2) the laboratory has written procedures to ensure the chain of  
4           custody; and

5           (3) the laboratory follows proper quality control procedures including:

6                   (A) the use of internal quality controls, including the use of  
7                   specimens of known concentrations that are used to check the performance and  
8                   calibration of testing equipment, and periodic use of blind specimens for  
9                   overall accuracy;

10                   (B) an internal review and certification process for substance abuse  
11                   test results, conducted by a person qualified to perform that function in the  
12                   laboratory;

13                   (C) security measures implemented by the laboratory to preclude  
14                   adulteration of specimens and test results; and

15                   (D) other actions as necessary to ensure reliable and accurate test  
16                   results.

17           (i) A laboratory shall disclose to the employer a written test result report  
18           within seven working days after receipt of the specimen. All laboratory reports  
19           of a substance abuse test result shall, at a minimum, state:

20                   (1) The name and address of the laboratory that performed the drug test  
21                   and the positive identification of the individual tested.

1           (2) Positive or negative results on confirmation tests, as applicable.

2           (3) A list of the drugs for which the drug tests were conducted.

3           (4) The type of tests conducted for both the initial drug test and the  
4 confirmation test and the threshold detection levels of the tests. No report shall  
5 disclose the presence or absence of any drug other than a specific drug and its  
6 metabolites listed pursuant to this section.

7           (j) A medical review officer shall provide technical assistance to the  
8 employer, employee, or job applicant for the purpose of interpreting any  
9 positive, confirmed test results which could have been caused by prescription  
10 or nonprescription medication taken by the employee or job applicant;

11           (k) All positive initial drug tests shall be confirmed using the gas  
12 chromatography/mass spectrometry method or an equivalent or more accurate  
13 and scientifically accepted method approved by the National Laboratory  
14 Certification Program or the College of American Pathologists as such  
15 technology becomes available in a cost-effective form.

16           (l) An employer must provide all employees with an education program on  
17 alcohol and other drug abuse before instituting a drug-free workplace program  
18 under this section, and an annual education program on alcohol and drug abuse  
19 and its effects on the workplace. An education program shall include, at a  
20 minimum, the following information:

21           (1) an explanation of the disease of alcohol and drug addiction;

1           (2) the effects and dangers of the commonly abused substances in the  
2           workplace;

3           (3) the employer's policies and procedures regarding alcohol and drug  
4           use in the workplace; and

5           (4) how employees who wish to obtain substance abuse treatment can  
6           do so.

7           (m) An employer must provide all supervisory personnel a minimum of  
8           two hours of training prior to adopting a drug-free workplace program under  
9           this section, and annual training after adoption of the program. The training  
10          shall address, at a minimum, the following topics:

11           (1) recognition of evidence of employee alcohol and drug abuse;

12           (2) documentation and corroboration of employee alcohol and drug  
13          abuse;

14           (3) referral of alcohol and drug abusing employees to appropriate  
15          treatment providers;

16           (4) the benefits for the employer and employees of referring alcohol and  
17          other drug abusing employees to treatment programs; and

18           (5) an explanation of any employee health insurance coverage for  
19          alcohol and drug abuse treatment.

20           (n)(1) Except as otherwise provided in this subsection, all information,  
21          interviews, reports, statements, memoranda, and drug test results, written or

1 otherwise, received or produced as a result of a drug-free workplace program  
2 are confidential and may not be used, obtained, or disclosed in any proceeding,  
3 except in accordance with this section or in determining an employee's right to  
4 compensation under this chapter.

5 (2) Employers, laboratories, medical review officers, employee  
6 assistance programs, drug rehabilitation programs, and their agents shall keep  
7 any information concerning drug test results obtained pursuant to this section  
8 confidential. Information concerning an employee or a job applicant's drug  
9 test results may only be released with the signed, written consent of the  
10 employee or job applicant on a form provided by the Commissioner, or  
11 pursuant to an order of the Commissioner or the Superior Court pursuant to  
12 this chapter, or by order of a professional licensing board in a related  
13 disciplinary proceeding. The consent form must contain, at a minimum:

14 (A) the name of the person who is authorized to obtain the  
15 information;

16 (B) the purpose of the disclosure;

17 (C) the specific information to be disclosed;

18 (D) the duration of the consent; and

19 (E) the signature of the individual authorizing release of the  
20 information.

1           (3) Nothing in this section shall be construed to require or permit a  
2           violation of federal or State laws governing confidentiality requirements for  
3           employee assistance professionals or alcohol and drug abuse counselors or  
4           treatment providers.

5           (4) Information from an employee or job applicant's drug test results is  
6           inadmissible as evidence in any criminal proceeding against him or her and  
7           shall not be used in any manner during the proceeding.

8           (5) This subsection shall not be construed to prohibit an employer or its  
9           agent, or a laboratory conducting a drug test from having access to an  
10           employee or applicant's drug test information or from sharing such  
11           information with legal counsel in relation to an action brought pursuant to this  
12           chapter or when the information is relevant to its defense in a civil or  
13           administrative matter.

14           (o)(1) Nothing in this section shall be construed to prohibit a collective  
15           bargaining agreement from requiring or prohibiting the implementation of a  
16           drug-free workplace program pursuant to this section.

17           (2) If a collective bargaining agreement provides for a drug-free  
18           workplace program pursuant to this section, the drug-free workplace program  
19           requirements shall be a mandatory subject for bargaining.

1 Sec. 2. 21 V.S.A. § 513 is amended to read:

2 § 513. DRUG TESTING OF EMPLOYEES; PROHIBITIONS;  
3 EXCEPTIONS

4 \* \* \*

5 (b) Random or company-wide tests. An employer shall not request, require  
6 or conduct random or company-wide drug tests except when such testing is  
7 required by federal law or regulation, or when such testing is conducted  
8 pursuant to a drug-free work place program under section 712 of this title.

9 (c) Exception. Notwithstanding the prohibition in subsection (a) of this  
10 section, an employer may require an individual employee to submit to a drug  
11 test if it is administered pursuant to section 712 of this title or if all the  
12 following conditions are met:

13 \* \* \*

14 Sec. 3. EFFECTIVE DATE

15 This act shall take effect on July 1, 2017.