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1996 Survey of Rhode Island Law: Legislation: Labor Relations. An Act Relating To Labor and Labor Relations - Drug Testing

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Labor Relations. *An Act Relating To Labor and Labor Relations—Drug Testing.* Provides for drug testing by employers under certain circumstances; for employee privacy; penalties for violating the statute; and the requisite standards for controlled substance testing required or requested by the employer. Also provides that employees who test positive for controlled substances shall not be terminated on that basis, but instead referred to a substance abuse professional. Effective, August 2, 1996. 1996 R.I. Pub. Laws chs. 136, 242.

This legislation (the Act) amends existing provisions under the labor statutes and labor relations statutes relating to drug testing of employees.¹ The stated purpose of the Act is to provide a balancing mechanism between the problems of substance abuse in the workplace and the public policy of safeguarding a person's right to privacy while at work.² The Act is intended to provide for the protection of the public, workplace safety, and the privacy and dignity of the employee through the use of confidential and scientifically reliable drug testing.³ The Act amends section 28-6.5-1 of the Rhode Island General Laws entitled, "Urine and blood testing generally prohibited,"⁴ to "Testing permitted only in accordance with this section,"⁵ apparently signaling a change from a presumptively prohibitive statutory provision to one that is presumptively permissive. Prior to the amendments, an employer could only require drug testing if there were reasonable grounds to believe, based upon specific objective facts, that the employee's use of a controlled substance was impairing his or her performance.⁶ The Act deletes the requirement of "specific objective facts"⁷ and replaces it with a requirement of "reasonable grounds . . . based on specific aspects of the employee's job performance and on specific contemporaneous observations, capable of being articulated, concerning the employee's appearance, behavior or speech."⁸

1. R.I. Gen. Laws § 28-6.5-1 (1995 & Supp. 1996).

2. 1996 R.I. Pub. Laws chs. 136, 242.

3. *Id.*

4. R.I. Gen. Laws § 28-6.5-1 (1995 & Supp. 1996).

5. *Id.*

6. *Id.* § 28-6.5-1(a)(1).

7. *Id.*

8. *Id.*

Under the Act an employee may not be terminated on the basis of a positive test, but must be referred to a "substance abuse professional . . . for assistance."⁹ In addition, employers who utilize drug testing are required to have "a drug abuse prevention policy" in place.¹⁰ The Act also mandates, with two exceptions, the confidentiality of test results.¹¹

Certain important provisions were not amended by this Act. First, an employer must still have some reasonable basis for requiring an employee to undergo a drug test.¹² The employee must be allowed to provide the test sample in private,¹³ and positive tests must be confirmed by specific tests chosen for scientific accuracy.¹⁴ Employees testing positive may request that the sample be sent to an independent testing facility at the employer's expense,¹⁵ and must be given "a reasonable opportunity to rebut or explain the results."¹⁶

Under both the prior and current statutory provisions, it constitutes a misdemeanor for an employer to subject an employee to a drug test beyond the provisions of the Act.¹⁷ Violations are punishable by a fine of up to one thousand dollars and/or up to one year in jail.¹⁸ A civil action may also be brought for violations of the Act, and a court may award an employee actual damages, punitive damages, reasonable attorney's fees and costs, as well as providing injunctive relief.¹⁹

The Act does not change the prior exemptions for employees covered under federal drug testing programs, nor does the Act prohibit employers in the public utility or mass transportation industries from testing employees, where drug testing is mandated as a

9. *Id.* § 28-6.5-1(a)(3) (Supp. 1996).

10. *Id.* § 28-6.5-1(a)(7).

11. *Id.* § 28-6.5-1(a)(8). Under this provision, positive results may be released to another employee with a "job-related need to know," or may be used to defend against any legal action brought by the employee against the employer. *Id.*

12. *Id.* § 28-6.5-1(a)(1) (1995 & Supp. 1996).

13. *Id.* § 28-6.5-1(a)(2).

14. *Id.* § 28-6.5-1(a)(4). The confirmatory tests required by the Act are gas chromatography or mass spectrometry. However, the Act also allows for other methods, if recognized as being at least as accurate. *Id.*

15. *Id.* § 28-6.5-1(a)(5). The employer is required to advise the employee of this right. *Id.*

16. *Id.* § 28-6.5-1(a)(6).

17. *Id.* § 28-6.5-1(b).

18. *Id.*

19. *Id.* § 28-6.5-1(c).

condition of receiving federal funds.²⁰ However, such testing must comply with the Act to the extent that it is not clearly inconsistent with applicable federal law or regulation.²¹

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20. *Id.* § 28-6.5-1(e).

21. *Id.*