S T A T E  O F  N E W  Y O R K

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2009-2010 Regular Sessions

I N  S E N A T E

February 25, 2009

Introduced by Sens. ADAMS, MONSERRATE, PARKER -- read twice and ordered printed, and when printed to be committed to the Committee on Labor

AN ACT to amend the labor law, in relation to drug and alcohol testing of police officers

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The labor law is amended by adding a new article 20-D to read as follows:

ARTICLE 20-D

DRUG AND ALCOHOL TESTING OF POLICE OFFICERS

SECTION 745. DEFINITIONS.
746. DRUG AND ALCOHOL TESTING OF POLICE OFFICERS.
747. TESTING PROCEDURES.
748. CONFIDENTIALITY.
749. RELATION TO COLLECTIVE BARGAINING.
750. APPLICABILITY.
751. SEVERABILITY.

S 745. DEFINITIONS. WHEN USED IN THIS ARTICLE, THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS:

1. "ALCOHOL" MEANS ANY BEVERAGE LISTED IN SECTION THREE OF THE ALCOHOLIC BEVERAGE CONTROL LAW.

2. "CONTROLLED SUBSTANCE" OR "DRUG" MEANS ANY ITEM OR SUBSTANCE LISTED IN SECTION THIRTY-THREE HUNDRED SIX OF THE PUBLIC HEALTH LAW.

3. "EMPLOYEE" OR "POLICE OFFICER" MEANS A POLICE OFFICER AS DEFINED IN SECTION 1.20 OF THE CRIMINAL PROCEDURE LAW WHO IS EMPLOYED IN A CITY WITH A POPULATION OF ONE MILLION OR MORE.

4. "EMPLOYER" MEANS THE CITY WITH A POPULATION OF ONE MILLION OR MORE WHICH EMPLOYS THE POLICE OFFICER WHO IS THE SUBJECT OF A TEST FOR THE PRESENCE OF ALCOHOL OR A CONTROLLED SUBSTANCE.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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5. "LABORATORY" MEANS A PUBLIC OR PRIVATE LABORATORY WHICH PERFORMS FORENSIC DRUG TESTING AND WHICH IS NOT OWNED OR OPERATED BY THE EMPLOYER.

6. "FIREARM" MEANS ANY FIREARM, RIFLE, SHOTGUN OR MACHINE GUN, ALL AS DEFINED IN SECTION 265.00 OF THE PENAL LAW.

S 746. DRUG AND ALCOHOL TESTING OF POLICE OFFICERS. 1. A POLICE OFFICER SHALL SUBMIT TO A CHEMICAL TEST IN ACCORDANCE WITH PROVISIONS OF THIS SECTION OF ONE OR MORE OF THE FOLLOWING: BREATH, BLOOD, URINE OR SALIVA, FOR THE PURPOSE OF DETERMINING THE ALCOHOLIC AND/OR DRUG CONTENT OF HIS OR HER BLOOD WHEN ANY ONE OR MORE OF THE FOLLOWING CIRCUMSTANCES APPLIES:

(A) SUCH POLICE OFFICER, WHILE IN THE COURSE OF HIS OR HER EMPLOYMENT AS A POLICE OFFICER, DISCHARGES A FIREARM AND SUCH DISCHARGE RESULTS IN SERIOUS PHYSICAL INJURY OR DEATH OF ANOTHER, AND, IN THE COURSE OF THE INITIAL INVESTIGATION OF SUCH DISCHARGE, ANY CREDIBLE EVIDENCE SUGGESTS THAT SUCH DISCHARGE MAY HAVE BEEN CARRIED OUT UNLAWFULLY OR IMPROPERLY;

(B) SUCH POLICE OFFICER, WHILE IN THE COURSE OF HIS OR HER EMPLOYMENT AS A POLICE OFFICER, DISCHARGES A FIREARM AND SUCH OFFICER HAS HAD A PRIOR DETERMINATION OF MISCONDUCT INVOLVING AN EXCESSIVE USE OF FORCE OR AN ABUSE OF POLICE POWERS; OR

(C) REASONABLE SUSPICION EXISTS TO BELIEVE THAT SUCH POLICE OFFICER, WHILE IN THE COURSE OF HIS OR HER EMPLOYMENT AS A POLICE OFFICER, HAS UNLAWFULLY INGESTED DRUGS, OR HAS CONSUMED ALCOHOL WHILE IN THE COURSE OF HIS OR HER EMPLOYMENT AS A POLICE OFFICER, OR HAS CONSUMED ALCOHOL TO SUCH A DEGREE THAT HIS OR HER ABILITY TO SAFELY PERFORM THE DUTIES ATTENDANT TO SUCH EMPLOYMENT HAVE BEEN IMPAIRED.

THE PROVISIONS OF PARAGRAPHS (A) AND (B) OF THIS SUBDIVISION SHALL NOT APPLY TO ANY POLICE OFFICER WHO DISCHARGES A FIREARM DURING THE COURSE OF FIREARMS PROFICIENCY TRAINING OR FIREARMS PROFICIENCY QUALIFICATION.

2. CHEMICAL TESTING AUTHORIZED BY THIS SECTION SHALL BE ADMINISTERED AS SOON AS POSSIBLE BUT IN NO EVENT MORE THAN THREE HOURS AFTER ANY OF THE CIRCUMSTANCES DESCRIBED IN SUBDIVISION ONE OF THIS SECTION HAVE OCCURRED. FAILURE BY SUCH POLICE OFFICER TO COMPLY WITH SUCH CHEMICAL TESTING REQUIREMENTS IN ACCORDANCE WITH THE PROVISIONS OF THIS SECTION SHALL SUBJECT SUCH OFFICER TO DISCIPLINARY PROCEEDINGS.

S 747. TESTING PROCEDURES. 1. THE EMPLOYER SHALL PROVIDE ALL EMPLOYEES WITH A WRITTEN POLICY IDENTIFYING THOSE INSTANCES UNDER WHICH A DRUG AND ALCOHOL TEST SHALL BE ADMINISTERED AND THE PROCEDURES TO BE FOLLOWED.

2. ALL SAMPLE ANALYSIS SHALL BE CONDUCTED BY A LABORATORY WHICH PERFORMS FORENSIC DRUG TESTING.

3. ALL EMPLOYERS AND LABORATORIES ENGAGED IN THE COLLECTION, HANDLING, TESTING OR STORAGE OF SAMPLES FOR THE PURPOSES OF THIS ARTICLE SHALL ADHERE TO THE PROCEDURES FOR THE CUSTODY, INTEGRITY AND SECURITY OF SUCH SAMPLES THAT COMPLY WITH REGULATIONS PROMULGATED BY THE DIVISION OF CRIMINAL JUSTICE SERVICES.

4. AT THE REQUEST OF THE EMPLOYEE, THE EMPLOYER SHALL PERMIT A REPRESENTATIVE OF THE EMPLOYEE'S COLLECTIVE BARGAINING UNIT TO BE PRESENT AT THE TIME OF ANY SAMPLE COLLECTION. IN THE EVENT THAT SUCH A REPRESENTATIVE IS NOT AVAILABLE WITHIN A REASONABLE PERIOD OF TIME, A CO-EMPLOYEE WITHIN THE SAME COLLECTIVE BARGAINING UNIT MAY BE DESIGNATED BY THE EMPLOYEE TO ACT AS A REPRESENTATIVE FOR THIS PURPOSE.

5. THE EMPLOYER SHALL SIMULTANEOUSLY COLLECT TWO SAMPLES IN SEPARATE CONTAINERS AND PROMPTLY SUBMIT BOTH TO A LABORATORY. ONE SAMPLE SHALL BE PRESERVED IN A SECURE FACILITY IN SUCH A WAY THAT IT MAY BE SUBSEQUENTLY TESTED FOR THE PRESENCE OF A CONTROLLED SUBSTANCE IN THE EVENT TESTING

OF THE OTHER SAMPLE INDICATES A POSITIVE RESULT FOR THE PRESENCE OF SUCH A SUBSTANCE.

6. ANY SAMPLE THAT INITIALLY TESTS POSITIVE FOR THE PRESENCE OF A CONTROLLED SUBSTANCE OR ALCOHOL SHALL, WHERE APPLICABLE, ALSO BE SUBJECTED TO A CONFIRMATORY TEST BY GAS CHROMATOGRAPHY WITH MASS SPECTROMETRY OR AN EQUIVALENT SCIENTIFICALLY ACCEPTED METHOD THAT PROVIDES QUANTITATIVE DATA REGARDING THE DETECTED CONTROLLED SUBSTANCE, CONTROLLED SUBSTANCE METABOLITES OR ALCOHOL.

7. A LABORATORY SHALL REPORT TO AN EMPLOYER THAT A SAMPLE IS POSITIVE ONLY IF BOTH THE INITIAL TEST AND THE CONFIRMATION TEST ARE POSITIVE FOR THE PRESENCE OF A CONTROLLED SUBSTANCE.

8. WITHIN THIRTY DAYS OF RECEIVING A REPORT INDICATING A POSITIVE TEST RESULT, THE EMPLOYER SHALL PROVIDE THE EMPLOYEE TESTED WITH AN OPPORTUNITY TO HAVE THE OTHER PRESERVED SAMPLE TESTED FOR THE PRESENCE OF A CONTROLLED SUBSTANCE OR ALCOHOL AT A LABORATORY DESIGNATED BY THE EMPLOYEE. THE TEST MAY BE AT THE EXPENSE OF THE EMPLOYEE. THE SAMPLE AND TEST IN SUCH EVENT SHALL REMAIN SUBJECT TO THE TESTING, PRESERVATION AND REPORTING REQUIREMENTS OF THIS SECTION AND THE RESULT OF ANY SUCH TEST SHALL BE PROVIDED TO THE EMPLOYEE AND, AT THE EMPLOYEE'S WRITTEN REQUEST, HIS OR HER COLLECTIVE BARGAINING REPRESENTATIVE.

9. ALL TEST RESULTS FROM THE LABORATORY SHALL BE IN WRITING AND SHALL CONTAIN, AT A MINIMUM, THE FOLLOWING INFORMATION:

(A) THE METHOD OF ANALYSIS FOR BOTH THE INITIAL AND ANY CONFIRMATORY TEST;

(B) THE RESULTS OF EACH TEST;

(C) THE SENSITIVITY OF THE METHODOLOGY EMPLOYED FOR CONFIRMATION, THE DETECTION LEVEL, MEANING THE CUT-OFF OR MEASURE USED TO DISTINGUISH POSITIVE AND NEGATIVE SAMPLES, ON BOTH THE INITIAL SCREENING AND CONFIRMATION PROCEDURES IF THE SAMPLE IS FOUND TO BE POSITIVE;

(D) THE ACCURACY AND PRECISION OF THE QUANTITATIVE DATA REPORTED FOR THE CONFIRMATION TEST; HOWEVER, IN THE CASE OF A NEGATIVE TEST, THE REPORT SHALL SPECIFY ONLY THAT THE TEST WAS NEGATIVE FOR CONTROLLED SUBSTANCES; AND

(E) THE NAME AND ADDRESS OF THE LABORATORY PERFORMING THE ANALYSIS, THE DATE THAT THE TEST WAS ADMINISTERED AND ANALYSIS WAS PERFORMED.

10. AFTER RECEIPT BY THE EMPLOYER OF A REPORT FROM A LABORATORY CONTAINING THE RESULT OF A TEST, THE EMPLOYER SHALL PROVIDE WRITTEN NOTIFICATION OF SUCH RESULT, WHETHER POSITIVE OR NEGATIVE, TO THE EMPLOYEE. THE NOTIFICATION SHALL BE PROVIDED WITHIN THE EMPLOYEE'S FIRST FIVE WORKING DAYS IMMEDIATELY FOLLOWING THE RECEIPT OF SUCH REPORT BY THE EMPLOYER DURING WHICH THE EMPLOYEE IS IN PERSONAL ATTENDANCE EACH DAY AT A FACILITY OPERATED BY THE EMPLOYER.

11. WITHIN THIRTY DAYS AFTER THE RECEIPT OF A REPORT CONTAINING A NEGATIVE TEST RESULT, THE EMPLOYER SHALL DESTROY ALL RECORDS, REPORTS AND OTHER DOCUMENTS IN ITS POSSESSION RELATED TO THE TEST AND SHALL NOT THEREAFTER MAKE REFERENCE TO THE TEST IN ANY EMPLOYMENT-RELATED PROCEEDINGS.

12. THE LABORATORY SHALL PRESERVE ALL SAMPLES IN A SECURE FACILITY FOR SIXTY DAYS AFTER THE ISSUANCE OF A TEST REPORT AND, UPON WRITTEN REQUEST FOR FURTHER PRESERVATION BY THE EMPLOYER OR EMPLOYEE RECEIVED WITHIN SUCH PERIOD, FOR SUCH AN ADDITIONAL PERIOD OF TIME AS MAY BE SPECIFIED IN THE REQUEST.

13. IN THE COURSE OF ANY DISCIPLINARY OR JUDICIAL PROCEEDINGS INVOLVING A POSITIVE TEST RESULT, AN EMPLOYEE SHALL HAVE THE OPPORTUNITY TO PRESENT EVIDENCE ON THE SIGNIFICANCE AND ACCURACY OF THE TEST RESULTS. AN EMPLOYEE MAY ALSO PRESENT EVIDENCE THAT THE PROCEDURES FOLLOWED WITH

RESPECT TO THE COLLECTION, HANDLING, TESTING OR STORAGE OF THE SAMPLE DESTROYED THE VALIDITY OF THE SAMPLE OR THE TEST RESULT. AN EMPLOYEE SHALL ALSO BE GIVEN THE OPPORTUNITY, AT HIS OR HER REQUEST, TO PRESENT THE RESULT OF ANY TEST FOR THE PRESENCE OF A CONTROLLED SUBSTANCE OR ALCOHOL WHICH MAY HAVE BEEN PERFORMED ON THE OTHER SAMPLE.

14. ANY EMPLOYER OR LABORATORY THAT IS FOUND, THROUGH LITIGATION, ARBITRATION OR ADMINISTRATIVE PROCEEDING, TO HAVE GENERATED OR RELIED UPON A POSITIVE TEST RESULT OF THE SUBJECT EMPLOYEE THAT IS EITHER FALSE OR NOT SUPPORTED BY LABORATORY DOCUMENTATION SHALL REPORT THAT FINDING IN WRITING TO THE COMMISSIONER OF HEALTH AND THE COMMISSIONER OF CRIMINAL JUSTICE SERVICES WITHIN THIRTY DAYS OF THE FINAL DISPOSITION OF SUCH A PROCEEDING.

S 748. CONFIDENTIALITY. 1. EMPLOYERS, LABORATORIES AND THE AGENTS THEREOF WHO RECEIVE OR HAVE ACCESS TO INFORMATION CONCERNING DRUG TESTS AND THEIR RESULTS SHALL KEEP ALL SUCH INFORMATION CONFIDENTIAL. EXCEPT WHERE THE RELEASE OF SUCH INFORMATION IS COMPELLED BY SUBPOENA OR COURT ORDER, ANY SUCH INFORMATION SHALL BE RELEASED ONLY UPON A WRITTEN CONSENT VOLUNTARILY EXECUTED BY THE EMPLOYEE. ANY CONSENT SHALL CONTAIN, AT A MINIMUM, THE FOLLOWING INFORMATION:

(A) THE NAME OR NAMES OF PERSONS AUTHORIZED TO OBTAIN THE INFORMATION;

(B) THE PURPOSE OF THE DISCLOSURE;

(C) THE PRECISE INFORMATION TO BE DISCLOSED; AND

(D) THE DURATION OF THE CONSENT.

2. THIS SECTION SHALL NOT APPLY TO PROCEEDINGS IN WHICH THE EMPLOYEE IS ACCUSED OF A CRIMINAL VIOLATION, NOR SHALL IT APPLY TO DISCIPLINARY OR JUDICIAL PROCEEDINGS RELATING TO EMPLOYMENT, OR TO PROSPECTIVE EMPLOYMENT INQUIRIES RECEIVED FROM ANY LAW ENFORCEMENT AGENCY.

S 749. RELATION TO COLLECTIVE BARGAINING. 1. NOTHING IN THIS ARTICLE SHALL BE CONSTRUED TO PROHIBIT, AS A SUBJECT OF COLLECTIVE BARGAINING, THE ESTABLISHMENT AND TERMS OF A PROGRAM TO TEST EMPLOYEES FOR CONTROLLED SUBSTANCES WHICH IS CONSISTENT WITH THE PROVISIONS OF THIS ARTICLE.

2. NOTHING IN THIS ARTICLE SHALL SUPERSEDE ANY COLLECTIVE BARGAINING AGREEMENT IN EFFECT ON THE EFFECTIVE DATE OF THIS ARTICLE. NO COLLECTIVE BARGAINING AGREEMENT COMMENCING ON OR AFTER THE EFFECTIVE DATE OF THIS ARTICLE MAY AUTHORIZE TESTING OF EMPLOYEES FOR CONTROLLED SUBSTANCES UNLESS IT CONTAINS TESTING PROCEDURES WHICH ARE CONSISTENT WITH THE PROVISIONS OF THIS ARTICLE.

S 750. APPLICABILITY. THE PROVISIONS OF THIS ARTICLE SHALL ONLY APPLY TO POLICE OFFICERS EMPLOYED IN A CITY WITH A POPULATION OF ONE MILLION OR MORE.

S 751. SEVERABILITY. IF ANY PROVISION OF THIS ARTICLE OR THE APPLICATION THEREOF TO ANY EMPLOYEE OR CIRCUMSTANCES ARE HELD TO BE INVALID, SUCH INVALIDITY SHALL NOT AFFECT OTHER PROVISIONS OR APPLICATIONS OF THIS ARTICLE WHICH CAN BE GIVEN EFFECT WITHOUT THE INVALID PROVISION OR APPLICATION, AND TO THIS END THE PROVISIONS OF THIS ARTICLE ARE SEVERABLE.

S 2. This act shall take effect on the ninetieth day after it shall have become a law, provided, however, effective immediately the division of criminal justice services shall be authorized to adopt any such rules and regulations deemed necessary to effect the provisions of this act.