

5240

2013-2014 Regular Sessions

I N A S S E M B L Y

February 21, 2013

Introduced by M. of A. WRIGHT, AUBRY, ARROYO, BRENNAN, CLARK, COOK,
DINOWITZ, GANTT, GLICK, HEASTIE, HOOPER, JACOBS, ORTIZ, PRETLOW,
ROBINSON, TITUS -- Multi-Sponsored by -- M. of A. FARRELL, KAVANAGH,
SCARBOROUGH -- read once and referred 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 ASSEM-
BLY, DO ENACT AS FOLLOWS:

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

3 ARTICLE 20-D

4 DRUG AND ALCOHOL TESTING OF POLICE OFFICERS

5 SECTION 745. DEFINITIONS.

6 746. DRUG AND ALCOHOL TESTING OF POLICE OFFICERS.

7 747. TESTING PROCEDURES.

8 748. CONFIDENTIALITY.

9 749. RELATION TO COLLECTIVE BARGAINING.

10 750. APPLICABILITY.

11 751. SEVERABILITY.

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

14 1. "ALCOHOL" MEANS ANY BEVERAGE LISTED IN SECTION THREE OF THE ALCO-
15 HOLIC BEVERAGE CONTROL LAW.

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

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

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

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

LBD00742-01-3

1 5. "LABORATORY" MEANS A PUBLIC OR PRIVATE LABORATORY WHICH PERFORMS
2 FORENSIC DRUG TESTING AND WHICH IS NOT OWNED OR OPERATED BY THE EMPLOY-
3 ER.

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

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

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

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

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

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

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

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

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

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

46 4. AT THE REQUEST OF THE EMPLOYEE, THE EMPLOYER SHALL PERMIT A REPRE-
47 SENTATIVE OF THE EMPLOYEE'S COLLECTIVE BARGAINING UNIT TO BE PRESENT AT
48 THE TIME OF ANY SAMPLE COLLECTION. IN THE EVENT THAT SUCH A REPRESENT-
49 TATIVE IS NOT AVAILABLE WITHIN A REASONABLE PERIOD OF TIME, A CO-EMPLOY-
50 EE WITHIN THE SAME COLLECTIVE BARGAINING UNIT MAY BE DESIGNATED BY THE
51 EMPLOYEE TO ACT AS A REPRESENTATIVE FOR THIS PURPOSE.

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

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

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

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

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

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

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

25 (B) THE RESULTS OF EACH TEST;

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

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

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

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

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

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

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

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

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

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

- 20 (A) THE NAME OR NAMES OF PERSONS AUTHORIZED TO OBTAIN THE INFORMATION;
- 21 (B) THE PURPOSE OF THE DISCLOSURE;
- 22 (C) THE PRECISE INFORMATION TO BE DISCLOSED; AND
- 23 (D) THE DURATION OF THE CONSENT.

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

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

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

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

42 S 751. SEVERABILITY. IF ANY PROVISION OF THIS ARTICLE OR THE APPLICA-
43 TION THEREOF TO ANY EMPLOYEE OR CIRCUMSTANCES ARE HELD TO BE INVALID,
44 SUCH INVALIDITY SHALL NOT AFFECT OTHER PROVISIONS OR APPLICATIONS OF
45 THIS ARTICLE WHICH CAN BE GIVEN EFFECT WITHOUT THE INVALID PROVISION OR
46 APPLICATION, AND TO THIS END THE PROVISIONS OF THIS ARTICLE ARE SEVERA-
47 BLE.

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