YOUR RIGHTS TO WORKPLACE PRIVACY IN RHODE ISLAND

INTRODUCTION

The workplace is where most adults spend roughly half their waking hours. In the interests of maintaining a productive workforce, some employers not only regulate employees' work behavior, but seek to extend their supervisory control to off-duty activities as well. It is thus not surprising that employees are subjected to employment practices that affect their privacy rights in many different ways.

Questions of workplace privacy encompass a wide range of practices -- including polygraph testing, drug testing, telephone monitoring and interference with personal lifestyle. The use of privacy-invasive techniques has increased as technological advances make it more practical and economical for employers to monitor and test their workforce.

Fortunately, there are some important limits on what employers can do in this regard, due in large part to a variety of state laws that the Rhode Island General Assembly has passed to protect employees' privacy rights. This booklet is designed to provide some answers to basic questions about those rights.

The reader should keep in mind a few points in using this book as a reference guide. First, as the result of court decisions and the passage of new statutes, the law in this area is constantly changing. Therefore, the information provided here should not be taken as the last word on the subject, but instead as an introduction to workplace privacy rights in Rhode Island. Further, a booklet like this cannot serve as a substitute for consulting with an attorney.

Second, it is important to realize that the extent of your rights can depend greatly on whom you work for or whether you belong to a union. Many employees in the private sector mistakenly believe that the Constitution protects their rights in the workplace. In fact, the Constitution provides protection only against *government* agencies, not private entities. Thus, only people working for the government enjoy certain constitutional rights in the employment setting. The rights of private sector employees depend almost exclusively on protections provided by their union, state and federal statutes, or an employment contract.

As a general rule, then, your rights in the workplace can have up to three different levels of protection. Employees in the private sector who do not have a union or employment contract generally have the least protection, and must rely mainly on any state and federal laws governing workplace privacy. Private employees with a union can rely on their union and its contract for possible additional protections.[1] Finally, government employees may further be able to advance constitutional claims for violations of their privacy.[2]

Again, because of the changing nature of this area of the law, employees who feel their privacy rights may have been violated are encouraged to contact their union, an attorney or the ACLU for information about their rights.

1. BEING QUESTIONED FOR A JOB

Q. Are there any limits on the types of questions I can be asked when I apply for a job?

A. Yes. Rhode Island's Fair Employment Practices Act (FEPA) makes it illegal for an employer to use any application form or otherwise attempt to find out information, directly or indirectly, about your race or color, religion, sex, disability, sexual orientation, age or country of ancestral origin.[3] In addition to preventing discrimination, this law helps protect your privacy and your ability to maintain the confidentiality of personal information that should be irrelevant to the employment application process. Thus, as a general rule, questions that ask you to denote your gender, race, birth date, whether you have a disability or have ever been treated for mental illness, and comparable types of inquiries are all illegal.

Some employers may ask job applicants to sign a consent form giving the employer unrestricted access to medical, school, employment and/or criminal records that pertain to the applicant. Such blanket consent forms are probably illegal, since access to these records would elicit details about an applicant's age, arrest record, physical or mental disabilities, etc. that the employer may not be entitled to have.

Q. Can an employer ask about my medical condition when I apply for a job?

A. Not initially. As noted above, state law prohibits inquiries that will elicit information about an applicant's mental or physical disabilities, and medical questions generally perform that illegal function. In addition, a federal law known as the Americans with Disabilities Act (ADA),[4] which applies to all businesses with 15 or more employees, provides broad-based protection against questions in the employment process that relate to an applicant's disabilities. The ADA specifically bans all pre-employment questions relating to medical conditions and disabilities until a conditional offer of employment is made.[5]

It is only *after* an employment offer has been made that an employer may require an applicant to undergo a medical examination or respond to medical inquiries. If an employer requires an examination at this stage, it must be required of *all* applicants for a particular job category, not just of selected applicants.

Significantly, while the final offer of employment may be conditioned on the results of those tests, the offer can be withdrawn only if the medical results indicate that the applicant is no longer qualified to perform the job even if he or she were given reasonable accommodation.

Q. Can I be asked whether I have ever filed for workers' compensation?

A. No. Like other questions that would elicit information about a person's disabilities, the ADA forbids employers from inquiring into their applicants' history of filing workers' compensation claims or seeking information about past job-related injuries until after a conditional offer of employment has been made.[6]

Q. Can I be asked about my arrest record?

A. No. The state FEPA specifically bars an employer from asking whether an applicant has ever been charged with or arrested for a crime.[7] The only exception is for law enforcement agency positions "or positions related thereto." The law does not, however, prevent employers from inquiring about any *convictions* a job applicant may have.

Q. May my prospective employer ask me about my plans to have children or my family responsibilities?

A. Possibly, but only if the questions are asked of all employees in a non-discriminatory fashion. Thus, it would be illegal for an employer to ask women job applicants, but not men, about their child-bearing plans or their familial responsibilities, or to use that information only against women. State law also makes clear that women affected by pregnancy or childbirth "shall be treated the same for all employment-related purposes (including fringe benefits) as other persons ... similar in their ability or inability to work."[8]

In addition, the U.S. Supreme Court has held that companies cannot, under federal law, adopt "fetal protection" policies that bar women of child-bearing age from certain hazardous jobs that could be harmful to fetuses.[9] Such policies would also be discriminatory under state law.

2. DRUG TESTING

Q. Can my employer require me to take a drug test?

A. Generally, no (although there are exceptions, which are described below). Recognizing both the inaccuracy of these tests and the indignity to workers that they represent, the Rhode Island legislature has adopted a very strict law regulating the use of drug testing by employers. While urine testing is the most common form of drug test, the law also applies to testing of a person's blood or other bodily fluid or tissue for evidence of drug use. Except for certain federally-regulated occupations, all random drug testing is banned under this law.[10]

A particular employee can be tested only when the employer has reasonable grounds to believe, based on specific aspects of the employee's job performance and specific, articulable contemporaneous observations, that the employee's use of controlled substances is impairing his or her ability to perform the job.[11] That is, the employer needs both reasonable grounds to believe you are using drugs *and* evidence that your drug use is actually interfering with your job perfor-

mance before you can be required to submit to such a test. Rumors that you take drugs are not sufficient grounds to require a test. Similarly, a policy requiring employees to be tested for drugs after any workplace accident would be improper under this law.[12]

Q. If my employer does have grounds to test me, what procedures have to be followed?

A. First, you must be allowed to give the sample in private, without anybody watching. Second, the employer must have any positive test result confirmed by a federally certified laboratory by means of scientifically accurate technology such as "gas chromatography/mass spectrometry."

Third, if the test comes back positive, you must be given the opportunity, at the employer's expense, to have the sample retested by another facility, and you must also be given the chance to explain the results (in case, for example, you have been taking a prescribed medication that shows up as a positive test). Any positive test results are required to be kept confidential by the employer, and may only be disclosed to other employees who have a job-related "need to know."

Fourth, testing is allowed only if the employer has formally adopted a drug abuse prevention policy, which complies with the drug testing statute.

Finally, and perhaps most significantly, the testing must have a remedial, not punitive, purpose. It is illegal under the law for an employer to fire a worker solely on the basis of a positive drug test result. Instead, employers can require employees testing positive to seek treatment with a substance abuse professional. Only if, in the course of such treatment, further testing indicates continued use of controlled substances, can the employee be fired based on test results.[13]

Q. What are the penalties if an employer violates the drug testing law?

A. Violation of the law is a misdemeanor punishable by a $1,000 fine or a year in jail. In addition, an aggrieved employee has the right to go into court to obtain a court order to halt any illegal drug testing and to obtain attorney's fees for successful suits under the law. The employee is further entitled to an award of punitive damages, as well as any actual damages that may have been incurred, for violations of the law.[14]

Q. What occupations are not protected from random testing?

A. First, Rhode Island's drug testing law specifically states that employees in two industries -- mass transportation and public utilities -- can be subject to random urine testing if it is made a condition by the federal government for a state agency's continued receipt of federal funds.[15]

In addition, there are some federally-regulated occupations where the federal government has mandated the implementation of random drug testing. When the federal government enacts such laws or regulations, they automatically override the protections provided by state law. Thus, certain employees in "safety-sensitive" positions may be subject to random testing even if they live in Rhode Island (although the constitutionality of some of these testing programs, and questions as

to what constitute "safety-sensitive positions" that can be subject to testing, continue to be challenged in the courts).

For example, an airline pilot here who was fired for refusing to submit to a drug test argued that the state's drug testing law protected him from dismissal. However, a federal appeals court held that federal regulation of the airline industry pre-empted Rhode Island's drug testing law.[16]

Q. Do I have any recourse if a drug test erroneously shows a positive result?

A. Possibly. The Americans with Disabilities Act could have some impact in this regard. The ADA bans discrimination against a person who is erroneously perceived to be an illegal drug user. Thus, an inaccurate drug test could make an employer liable under the ADA.[17] An employer and/or the facility performing the testing could potentially be liable on grounds of negligence, defamation or similar claims.[18]

Q. You keep on referring to employees. Does that mean that job applicants can be tested for drugs?

A. In private employment, yes. However, state law sets certain conditions on such pre-employment testing. First, testing can be required only after the applicant has been given a conditional offer of employment. Further, the applicant must be allowed to give the sample in private, and the employer must confirm any positive test result with the use of "gas chromatography/mass spectrometry" or similarly accurate technology.[19] However, an employer need not follow these testing conditions to the extent they are inconsistent with federal law requirements.[20]

Q. What about applicants for government jobs?

A. Rhode Island prohibits drug testing for most persons seeking employment with the state or municipalities. Testing of applicants for government jobs is allowed only for the following occupations: (1) law enforcement officers; (2) correctional officers; (3) firefighters; and (4) occupations where testing is required by federal law or required for the continued receipt of federal funds.[21]

3. HONESTY AND PERSONALITY TESTING

Q. Can my employer or prospective employer force me to take a polygraph (lie detector) test?

A. No. Under Rhode Island law, no employer may require an employee or job applicant to submit to a lie detector test as a condition of either obtaining a job or continuing employment. In fact, it is unlawful for an employer to even *ask* a job applicant or employee to take a lie detector test. An employer cannot get around this prohibition by having you take the test outside the state. In short, state law makes it clear that these tests have no place whatsoever in the workplace.[22]

Q. What should I do if I'm told or asked to take a polygraph test?

A. The law gives you the right to go into court and obtain an order barring the test from being given. In addition, the court can award damages and attorney's fees to an employee or job applicant who was illegally asked or forced to take a test.[23] You can also contact the Attorney General's office and the local police department, since violation of this law is a misdemeanor punishable by up to a $1,000 fine.[24]

Q. Are any other types of "lie detector" tests prohibited?

A. Yes. The term "lie detector" is broadly defined in the law.[25] Although polygraph tests are perhaps the most well known type of "lie detector," there are others. For instance, psychological stress evaluators (PSE's) claim to detect and record fluctuations in your voice produced by stress, which allegedly indicate if you are lying. These are just as unreliable as polygraph tests, and just as illegal.

Q. What about written "honesty" tests?

A. Because of the state's strict ban on polygraph tests, some employers have turned to another tool: pencil-and-paper "honesty tests." By asking a series of yes-no or multiple-choice questions designed to measure your attitudes toward theft, these tests claim to determine whether you are an honest person. While these written tests are not banned in the state, their use is strictly limited. Rhode Island law prevents employers from using the results of such a test as the primary basis for an employment decision.[26] Thus, if you apply for a job in which you take a written "honesty test," and you don't get hired, your rights have been violated unless the employer can indicate another legitimate reason for not hiring you. The penalties and remedies for improper use of "honesty tests" are the same as those for polygraph tests.

Q. Can employers give psychological tests?

A. While there has been little litigation challenging such tests on privacy grounds, federal and state anti-discrimination laws limit the use of psychological testing in a few significant ways. First, it is probably illegal for such tests to contain questions relating to race, sex, religion or other classes protected by anti-discrimination laws. Consider the example of the Minnesota Multi-Phasic Personality Inventory (MMPI), a popular psychological test administered to police candidates and in other occupations. The R.I. Commission for Human Rights found probable cause to believe that the inclusion of questions about religious beliefs in the MMPI violated the state law's ban on employers asking job applicants questions relating to their religion. As a result of that finding, a consent order was issued, and those questions were deleted from the tests given police officer applicants in the state.[27]

In addition, the federal Civil Rights Act of 1991 prohibits the adjustment of scores or use of different cut-off scores in tests on the basis of race, sex, national origin or religion.[28] Some psychological tests, such as the MMPI, have had separate scoring systems for males and females

taking their tests, and use of such systems would appear to be illegal under this federal law.

Of even more significance, the Americans with Disabilities Act bans most psychological testing prior to the conditional offer of employment to a job applicant. The determining factor in the test's pre-employment propriety is whether it constitutes a "medical" examination. Federal guidelines state that psychological tests are considered medical examinations "to the extent that they provide evidence concerning whether an applicant has a mental disorder or impairment," or if the exam is used by an employer "to assess an applicant's general psychological health."[29]

The guidelines go on to note that even if the test does not constitute a medical examination, "individual inquiries on the test that concern the existence, nature, or severity of a disability are prohibited at the pre-offer [of employment] stage." Most psychological tests would fall into these categories, in whole or in part, and their continued pre-employment use will often be open to challenge.

The same would appear to apply to so-called "personality tests," which are sometimes designed to determine whether the individual has any mental impairments, or any characteristics such as excessive anxiety or depression, that can be used to identify such impairments. In fact, an EEOC opinion has held that "handwriting analysis" can constitute an illegal medical examination if it is used to try to make such determinations.[30]

While the ADA allows medical examinations after hiring, they must be "job-related and consistent with business necessity,"[31] and cannot of course be used in a discriminatory manner.

4. SEARCHES AND SURVEILLANCE

Q. Does my employer have the right to physically search me or my belongings at the workplace?

A. Generally, a private employer is free to search you, your desk, your locker, and other belongings. There are some limitations, however. For example, the employer cannot differentially enforce search policies on such grounds as sex or race. Further, employer searches performed with the intent to harass a person engaged in union activities may be an unfair labor practice prohibited by federal law.

In addition, it is possible that, under certain circumstances, you may have other remedies. If you belong to a union, the union contract may limit the employer's right to search. For particularly egregious or intrusive searches, you may have private causes of legal action based on allegations of assault, false arrest, mental distress or other grounds.

Q. Are the search rules different if I work for a government agency?

A. Yes. A governmental employer has less freedom to search employees because the public employee is protected from unreasonable searches and seizures under the Fourth Amendment to

the U.S. Constitution. In 1987, the U.S. Supreme Court held that public employees have some expectation of privacy in their place of work, and thus an employer's search of a desk or file is allowable only if it is, in the Court's words, "reasonable under all the circumstances."[32] The Court further suggested that a higher standard might be appropriate for such items as a closed briefcase or handbag, in which one's expectation of privacy is particularly great.

In a Rhode Island case, a federal appeals court ruled that a mayor had an expectation of privacy in an appointment calendar contained in a box in a Town Hall attic. Emphasizing the need for a case-by-case analysis, the court held that the mayor had a legitimate privacy interest in the contents of the calendar, which contained both personal and public entries, and that his expectation of privacy was not necessarily limited to his or her own work area.[33] In other cases, though, courts have not been as receptive to privacy claims arising from workplace searches.[34]

Q. Can my employer monitor my phone or private conversations?

A. It depends. Phone monitoring has long been practiced by companies with operators that deal regularly with the public. Rhode Island has laws that generally restrict the interception of phone communications without consent of one of the parties to the conversation,[35] but there is an exception for agents or employees of "a communication common carrier" that engages in monitoring of phone calls "for mechanical or service quality control checks."[36] Thus, it is not illegal, for example, for the telephone company to listen in on operator phone calls.

In other circumstances, though, an employer may be in violation of state law -- or a similar federal statute[37] -- if he or she eavesdrops on your personal phone conversations in the workplace. The same would be true for other types of audio surveillance, whether they are wire, oral or electronic communications. For example, if an employer places a microphone in a work area or locker room, and the equipment is capable of picking up private conversations of employees, this would appear to be illegal.[38]

Q. Can an employer engage in video surveillance?

A. In private employment, probably. There are no laws in Rhode Island governing employers' use of such devices as two-way mirrors or workplace surveillance cameras which do not pick up sound. There is one specific exception, though: a state labor law bars an employer from spying upon or keeping under surveillance employee activities which are related to the exercise of collective bargaining rights or the forming of labor unions.[39] In addition, use of video cameras in certain private workplace locations -- such as a restroom -- could be deemed to violate a state statute, which protects the "right to be secure from unreasonable intrusion upon one's physical solitude or seclusion."[40]

If you work for the government, you likely have greater protection from questionable surveillance techniques that are an invasion of a legitimate expectation of privacy. The legal standards would be similar to those governing workplace searches, focusing on a factual analysis of the reasonableness of the employee's expectation of privacy. Thus, an employer's overt use of a

video surveillance system in open work areas would not violate the Fourth Amendment, but if videotaping were done surreptitiously or where an office's physical layout suggested an expectation of privacy, the result might be different.[41]

Q. What about the privacy of e-mail in the workplace?

A. This is a new and evolving area of the law, so there are no clear answers. Employers can be expected to argue that the computer systems are company resources and that employees have no privacy rights in their use of e-mail. However, employees can analogize use of e-mail to the use of telephones and to the limits that anti-eavesdropping laws place on employers monitoring private conversations.

Ultimately, employees' rights in this regard may boil down to the "reasonable expectation of privacy" question based on the facts of the particular situation. For example, were employees given advance notice that their e-mail was subject to monitoring? Do employees use their own computers in connection with their work? And so on.

The National Labor Relations Board has issued a few opinions which begin to address some of these issues in the context of labor disputes. In one case, the Board held that an employee using the company e-mail system to communicate with co-workers to criticize a personnel policy was protected by federal labor law.[42] In another ruling, the Board held that a policy allowing employees to use e-mail for personal use but not to distribute union literature violated the law.[43]

The NLRB General Counsel's office also issued an "advice letter" involving Pratt & Whitney, concluding that a policy prohibiting all personal use of the company's e-mail system was illegally overbroad because it restricted union solicitation during non-work time.[44]

Another major unresolved issue at this point is whether e-mail monitoring by employers is a mandatory subject of collective bargaining. It will probably be a few years before clearer legal standards are in place on this general subject.

5. CRIMINAL RECORD CHECKS

Q. Can an employer obtains a criminal background check on me?

A. Possibly. For certain jobs, state law (and, in some instances, federal law) requires an applicant to undergo a criminal background check, and the R.I. Supreme Court has upheld the constitutionality of such requirements.[45] An unanswered question is whether an employer that does not have specific statutory authority to obtain such information may force a job applicant to sign a waiver permitting the release of his or her criminal record history from the state Bureau of Criminal Identification (BCI).

Some employers do this, and it appears to circumvent the state ban on asking job applicants about their arrest records, since arrests not followed by convictions may often show up on the BCI

records. A lawsuit will probably be the only way to resolve the legality of this practice.

Q. Can I be forced to get fingerprinted for a job?

A. Under certain circumstances. For a few occupations, ranging from day care workers to campus security personnel, Rhode Island law specifically requires applicants to be fingerprinted.[46] In many instances, however, the law also requires that the police destroy the prints promptly once a criminal record check, based on the fingerprints, is completed.[47] Some federally-regulated jobs also have fingerprinting requirements. If not authorized by law, however, and if used for purposes of a criminal records check, such an employment requirement might be an unlawful circumvention of the state ban on seeking arrest information of a job applicant.

Q. Can I be fired or not hired because I have a criminal record that is unrelated to my employment?

A. While an absolute ban on hiring persons with any criminal record may be challenged under anti-discrimination laws if it screens out a protected class,[48] private employers otherwise have great discretion in taking employment actions based on past criminal convictions. If you work in the private sector and do not belong to a union, you probably have little recourse even if the crime has no relation to your job, unless you can show that the employer treats certain people with criminal records differently because of their race or some other reason prohibited by law. If you have a union, it is very possible you have additional protections against being fired for this reason.
If you work for the government, such a firing or failure to be hired may be in violation of your constitutional rights. The courts have generally required government employers to demonstrate a connection between the criminal offense and the person's job. However, the courts have used varying standards in defining this connection, and have sometimes been very deferential to the actions of government agencies.

Thus, a federal court in Rhode Island held that a Department of Transportation rule that banned ex-felons from being school bus drivers was a rational requirement in light of the sensitive nature of the job and the involvement of children.[49] Employees in less sensitive positions, on the other hand, may be able to challenge similar across-the-board bans where there is no evidence that the criminal record has any bearing on the employee's performance or qualifications for the job.[50]

State civil service laws also give classified employees certain guarantees of job security that can be overturned only for good cause.[51] State personnel regulations provide that only convictions "deemed pertinent to the position" may serve as grounds for refusing to hire an applicant.[52] This means that the particular circumstances of your case will determine the propriety of a discharge or failure to be hired.

6. PERSONAL LIFESTYLE AND OFF-DUTY ACTIVITIES

Q. ***Can an employer prohibit me from smoking off-duty?***

A. No. Basic privacy issues came to the fore when some employers -- allegedly in order to promote the health of employees and save the employer medical expenses -- began making non-smoking both on and off-duty a condition of employment. In response to this particular problem, the General Assembly enacted legislation which states that an employer cannot prevent employees or job applicants from using tobacco products outside the course of their employment.[53] An employee or job applicant who is discriminated against on such a basis may file suit to obtain relief. The law contains an exemption for non-profit organizations which, as one of their primary objectives, discourage tobacco use by the general public. In addition, the law has no effect on no-smoking bans in the workplace.

Q. Can my employer tell me how to dress or wear my hair on the job?

A. If you are a private employee, you generally must follow your employer's dress and grooming codes. Even policies that would appear discriminatory -- such as ones requiring short hair on men but not on women -- have generally been deemed permissible as long as they have some justification in commonly accepted social norms and are reasonably related to business needs, such as fostering a good business-customer relationship.[54]

However, violations of federal law have been found with regard to a number of other dress and grooming requirements where the discriminatory burden is considered particularly great. For example, a dress code which required female but not male workers to wear a prescribed uniform which they had to pay to maintain, was found to constitute sex discrimination.[55] Other policies which have been held to be impermissible include rules imposing on female, but not male, flight attendants a ban on wearing eyeglasses, and certain dress policies that restrict an employee's ability to wear garments which are required by his or her religion.[56] Courts have also held that employers could not force employees to wear sexually provocative clothing.[57] In addition, "no beard" policies may have a disparate impact on blacks, because African-Americans are much more likely to suffer from a condition called pseudo folliculitis barbae (PFB), which makes it necessary to refrain from shaving. Thus, company policies which fail to make exceptions for this may be illegal.[58]

Public employees may additionally attempt to challenge dress and grooming codes as a denial of constitutional rights, although how successful such challenges would be is unclear. The U.S. Supreme Court, in concluding that a regulation establishing hair grooming standards for police officers was constitutional, left the door open for other challenges to proceed.[59] The Court assumed in its opinion that the Constitution provides individuals some protection in their choice of personal appearance, but it upheld the police regulation in that case by noting the paramilitary nature of the employment involved and the strong governmental interests in promoting uniformity and discipline in such an occupation. These interests are not likely to be as significant in other public employment contexts, but the courts as a general rule have remained reluctant to find reasonable dress and grooming codes illegal.

Q. Can I be denied a job because of my physical appearance?

A. It depends. Under the ADA as well as state anti-discrimination laws, it is illegal to discriminate on the basis of a physiological disorder or an employer's perception that the applicant or employee has such a disorder. Put another way, an employer may be able to deny employment to a person based on a physical *characteristic* (such as having black hair), but not if that characteristic also constitutes a physical impairment or is regarded as one. (Of course, other anti-discrimination laws might be implicated if the physical characteristic was related to race or national origin.) Thus, a federal appeals court ruled in favor of a Rhode Island woman's disability discrimination claim after she was denied a job with the state solely because she weighed over 300 pounds. The court ruled that morbid obesity could be deemed a disability or perceived disability protected under federal anti-discrimination laws.[60]

Similarly, a person with a cosmetic disfigurement is protected from discrimination if the employer regards that disfigurement as substantially limiting the person's ability to work. For example, a court ruled that a ski resort violated disability discrimination laws when it fired a chambermaid with no natural upper teeth who refused to wear her dentures to work because they hurt her.[61] Ultimately, the determination of what constitutes illegal discrimination on the basis of physical appearance will be very fact-specific.

Q. May an employee be dismissed for having sexual relations with a person of the opposite sex to whom he or she is not married?

A. The law does not prevent a private employer from discharging an employee who engages in extra-marital sex. Private sector employers have great discretion in deciding to terminate their associations with people they consider "immoral." However, a violation of the law may exist if the employer dismisses a female employee for taking part in an "affair," but takes no action against the male employee (or vice versa), or makes inquiry about "affairs" of applicants or employees of only one sex.

In the public sector, the employer typically cannot discharge an employee without cause. Moreover, the public employee may assert constitutional rights of due process and privacy in support of his or her right not to be dismissed. Thus, a public sector employer generally would have to show that the employee's extra-marital conduct made the employee in some way unfit to perform his or her job and that the state's interest in dismissal outweighed the employee's constitutional rights. The federal court decisions on this issue have not been uniform, however, so whether the dismissal of a public employee for off-duty sexual conduct is permissible may depend on the specific circumstances of the case.[62]

Q. May my employer discriminate against me if I am gay or lesbian?

A. In most places of employment, the answer is "no." In 1995, Rhode Island became the ninth state to enact legislation barring discrimination on the basis of sexual orientation in employment. Under the Fair Employment Practices Act, gay men, lesbians and bisexuals have the same protections and remedies as do people discriminated against in employment on grounds of race, religion, sex, disability, age or country of ancestral origin.[63] The remedies can include hiring or reinstatement, back pay, compensatory damages and attorneys fees.[64] The employers covered by FEPA include all government entities, any private entity employing four or more people, as well as people "acting in the interest of an employer directly or indirectly."[65] Employment agencies and labor organizations are also prohibited from engaging in discriminatory activities under FEPA.[66] A person who was discriminated against on the basis of his or her *heterosexuality* is also protected under the law.[67]

It is also illegal for an employer to discriminate against a gay man or a lesbian based on prejudicial fears about HIV. That is because state and federal laws prohibit discrimination against employees or job applicants on the basis of HIV-status or the *perception* that a person is HIV-positive.[68] Under these circumstances, a gay man or lesbian would have legal recourse against the employer.

Q. Can my employer require me to live in the city or town where I work?

A. Generally, yes. There are no laws prohibiting such a requirement for private employees. The courts have also rejected legal challenges made by *government* employees who alleged that municipal residency policies violated their constitutional right to travel.[69] Thus, a city or town can generally require its employees to live within that municipality.

There are a few important qualifications to this general rule, however, because in special circumstances such a requirement may be subject to legal challenge. In one instance, where a town's population was 99.8% white, a federal court found the town's residency requirement racially discriminatory, and held that the first black police officer hired there could be exempted from meeting the requirement under the circumstances of the case.[70] Also, while cities and towns may demand that their employees live where they work, municipalities probably cannot reject *applicants* who have not yet established residency in the community.[71]

Finally, different issues are raised if a municipality attempted to require private contractors on city-funded projects to abide by residency requirements. Such requirements are likely unconstitutional.[72]

Q. If municipalities can require their own employees to live where they work, does that mean the state can require its employees to live within Rhode Island?

A. Probably not. While Rhode Island does have a law requiring most classified state employees to live in Rhode Island,[73] its constitutionality is open to question. That is because, unlike intra-state restrictions, state laws which discriminate against residents of other states are subject to much

greater legal scrutiny under a provision in the U.S. Constitution known as the Privileges and Immunities Clause.

This Clause has been held to generally protect, among other things, an individual's right "to pursue a livelihood in a State other than his own."[74] Rhode Island's state residency law has never been legally challenged, but it may very well run afoul of this constitutional provision.

Q. Can I take time off to raise a child or care for a sick family member without losing my job?

A. Possibly. Rhode Island has adopted a law known as the "Parental and Family Medical Leave Act."[75] The law applies to full-time employees in all state agencies, in municipal agencies with thirty or more employees, and in private businesses employing 50 or more people. The law entitles such employees, if they have worked at their place of employment for at least a year, to 13 consecutive weeks of unpaid leave due to the birth of a child to the employee, the adoption of a child, or the serious illness of a family member.

The Act allows aggrieved individuals to go into court to vindicate the rights to parental and medical leave provided by the law. Enforcement powers are also given to the state Department of Labor.[76] In 1993, Congress passed a similar federal law.[77]

7. MEDICAL PRIVACY

Q. Can my employer require me to take a test for HIV?

A. Except in very rare circumstances, state law specifically forbids employers from requiring employees or job applicants to be tested for HIV, the virus responsible for AIDS, or from firing or refusing to hire somebody because they have AIDS or are HIV-positive. The only exception to this strict ban is when "non-discrimination can be shown, on the testimony of competent medical authorities, to constitute a clear and present danger of HIV virus transmission to others."[78]

Q. Do I have any recourse if an employer disseminates medical information about me to others?

A. Probably. With only a few narrow exceptions, the federal ADA sets very strict limits on the release by employers of information obtained from post-offer and post-hire medical examinations of employees.[79]

In addition, Rhode Island has a health care confidentiality act which limits the dissemination, by an employer or others, of your medical records without your consent.[80] There are a large number of exceptions to the law, however.[81]

Nonetheless, the statute authorizes persons whose confidentiality has been violated to sue for damages, and successful suits have been brought under the law.[82] Knowing violations of the law

also carry potential criminal penalties.

Q. Can employers engage in genetic testing of their employees or job applicants?

A. No. Genetic testing -- which can be used to determine a person's susceptibility to certain diseases -- has been required by some employers across the country. Because this testing can divulge private information about a person's genetic traits and can be utilized for discriminatory purposes, Rhode Island has banned its use in the employment setting. State law bars employers from requesting, requiring or administering genetic tests to employees or job applicants. It is also illegal for a third party to sell to, or interpret for, an employer a genetic test of a current or prospective employee.[83] Damages, attorney's fees and injunctive relief may be obtained in court for any violation of this ban.[84]

Q. If I have a drug or alcohol abuse problem, am I protected from discrimination?

A. Possibly. Both the ADA and Rhode Island's Fair Employment Practices Act regard alcoholism as a protected disease, and both laws further provide protection to recovering drug addicts (but not to people with a current drug problem).[85] Thus, while a person's unsatisfactory workplace performance or conduct that is related to a drug or alcohol problem is not protected, an employee's mere *status* as an alcoholic or recovering drug addict is not a proper subject for discriminatory action by an employer.

Q. Do I have any privacy protections if I participate in an Employee Assistance Program?

A. Yes. Many employers have established Employee Assistance Programs (EAP) to provide workers access to professional help for personal problems they may be having. Because employees often disclose very private information to EAP counselors, confidentiality is crucial. Rhode Island has enacted a law to safeguard that confidentiality. With one exception, the law prohibits employers from releasing the name, address or any other information obtained through an employee's participation in an EAP.[86] The only time an employer may breach this confidentiality is when the information relates to a crime which must be reported by law. An employee whose privacy is violated may go into court and obtain compensatory and punitive damages, attorney's fees and injunctive relief against the employer.[87] It is important to note, however, that this law does not in any way address limitations on an employer's right to obtain information from the program.

8. MISCELLANEOUS PRIVACY ISSUES

Q. Can an employer require me to disclose personal tax information?

A. Not in the pre-employment setting. A state law bars employers from requesting or requiring job applicants to provide copies of their income tax returns "or related tax documents" as a condition of consideration for employment.[88] Injunctive and monetary remedies are available for violations of this law.

Q. Do I have a right to inspect my personnel file?

A. Yes. A state law gives all employees the right, after at least seven days notice, to inspect their personnel file.[89] Exempted from review are: records relating to the investigation of possible criminal offenses; records prepared for use in any criminal, civil or grievance proceedings; letters of reference or recommendations; managerial records kept or used only by the employer; confidential reports from previous employers; and managerial planning records. In addition, employers do not have to let an employee see his or her file more than three times in any one year.

A federal law, known as the Privacy Act, gives federal employees even broader rights to inspect their records, including the opportunity to contest inaccurate information in their files and to have it corrected.[90] State employees have similar rights under Department of Administration personnel regulations.[91]

Q. How does the law protect victims of domestic violence from workplace discrimination?

A. In response to stories of employers further victimizing victims of domestic violence, a state law was enacted which recognizes that it is up to the victim, not his or her employer, to decide whether to seek help in the courts for this problem. The law bars employers from firing, refusing to hire or otherwise discriminating against a person solely because she or he sought or obtained, or refused to seek or obtain, a domestic violence restraining order. The statute provides various remedies for employer violations.[92]

9. "BLOWING THE WHISTLE"

Q. If my employer violates my privacy rights that are protected by law, can he or she retaliate against me if I "blow the whistle?"

A. No. Rhode Island has a "Whistleblowers' Protection Act" which protects all employees -- both public and private -- from retaliation for reporting any violation of federal, state or municipal law to a public body, including a court.[93] (The protection does not apply, however, if you file a report that you know or have reason to know is false.) The law also protects an employee who refuses to violate the law at an employer's behest. If an employer does retaliate against you, this Act gives you the right to go into court to obtain redress. In such a case, the court is authorized to order appropriate remedies, including reinstatement with back pay, damages, and attorney's fees.[94]

There are also some overlapping federal and state laws which protect employees from retaliation in particular instances, such as for reporting illegal discrimination in the workplace.[95] Further, if you are a government employee, you can challenge your employer's action -- whether it's to discharge, discipline, demote or otherwise discriminate against you -- as a violation of your constitutional rights.[96]

We hope that you find this handbook on privacy rights in the workplace to be a helpful

reference tool. Remember: the rights you have are meaningful only if you exercise them.

ENDNOTES

1. At the same time, state law privacy claims which depend upon the meaning of the collective bargaining agreement may be preempted under the federal Labor Management Relations Act, 29 U.S.C. §185. See, e.g., *Flibotte v. Pennsylania Truck Lines*, 131 F.2d 21 (1st Cir. 1997).

2. Ironically, however, state employees may have less protection than other employees where federal *statutes* are involved. That is because, in a series of recent decisions, the U.S. Supreme Court has held that states have "sovereign immunity" from suit by individual employees under federal laws such as the Age Discrimination in Employment Act, *Kimel v. Florida Board of Regents*, 68 U.S.L.W. 4016 (2000), and potentially many other similar laws.

3. R.I.G.L. §28-5-7(4)(i) and (iii).

4. 42 U.S.C. §12101.

5. 42 U.S.C. §12112; 29 C.F.R. §1630.13 *et seq*.

6. "EEOC Enforcement Guidance: Workers' Compensation and the ADA," Doc. No. 915.002, September 3, 1996.

7. R.I.G.L. §28-5-7(7).

8. R.I.G.L. §28-5-6(2).

9. *United Auto Workers v. Johnson Controls*, 499 U.S. 1196 (1991).

10. R.I.G.L. §28-6.5-1.

11. R.I.G.L. §28-6.5-1(a)(1).

12. *Accord*, *Doyon v. Home Depot USA Inc.*, 850 F.Supp. 125 (D. Conn. 1994).

13. R.I.G.L. §28-6.5-1(a)(2) through (a)(8).

14. R.I.G.L. §28-6.5-1(a)(3).

15. R.I.G.L. §28-6.5-1(e). *See* also, e.g., R.I.G.L. §20-2-27.1(c), requiring licensed charter boat operators and crew to be subject to federal drug testing requirements.

16. *French v. Pan Am Express*, 869 F.2d 1 (1st Cir. 1989).

17. 42 U.S.C. §12114.

18. *See*, e.g., *Willis v. Roche Biomedical Laboratories*, 21 F.3d 1368 (5th Cir. 1994).

19. R.I.G.L. §28-6.5-2(a).

20. R.I.G.L. §28-6.5-2(c).

21. R.I.G.L. §28-6.5-2(b).

22. R.I.G.L. §28-6.1-1.

23. R.I.G.L. §28-6.1-3.

24. R.I.G.L. §28-6.1-2.

25. R.I.G.L. §28-6.1-4.

26. R.I.G.L. §28-6.1-1.

27. *Tucker v. Town of Glocester Police Department*, RICHR No. 88 ERE 319-19/19.

28. 42 U.S.C. §2000e-2(l).

29. "Enforcement Guidance on Preemployment Disability Related Inquiries and Medical Examinations Under the Americans with Disabilities Act," Equal Employment Opportunity Commission, May 19, 1994.

30. 17 NDLR 231, Opinion issued 2/11/2000.

31. 42 U.S.C. §12112(d)(4)(A).

32. *O'Connor v. Ortega*, 480 U.S. 709 (1987).

33. *U.S. v. Mancini*, 8 F.3d 104, 108-109 (1st Cir. 1993).

34. *See*, e.g., *Gossmeyer v. McDonald*, 128 F.3d 481 (7th Cir. 1997).

35. R.I.G.L. §11-35-21; R.I.G.L. §12-5.1-1 *et seq*.

36. R.I.G.L. §11-35-21(c)(1).

37. 18 U.S.C. §2510 *et seq*. (1987).

38. *See*, e.g*., Desilets v. Wal-Mart Stores, Inc.*, 171 F.3d 711 (1st Cir. 1999)(upholding award of damages under federal anti-wiretapping law against employer who used hidden recording devices to tape employees' private conversations).

39. R.I.G.L. §28-7-13(1). However, R.I.G.L. §28-7-45(a) provides that certain employers are exempt from

the provisions of the chapter in which this prohibition appears.

40. R.I.G.L. §9-1-28.1(a)(1).

41. *Vega-Rodriguez v. Puerto Rico Telephone Company*, 110 F.3d 174, 180 (1st Cir. 1997).

42. *Timekeeping Systems, Inc*., 323 N.L.R.B. No. 30 (1997).

43. *E.I. DuPont de Nemours & Co*., 311 N.L.R.B. 893 (1993).

44. For a brief review of these issues, see 68 U.S.L.W. 2488, 2/22/00.

45. *Henry v. Earhart*, 553 A.2d 124 (R.I. 1989).

46. *See*, e.g., R.I.G.L. §16-48.1-5.

47. R.I.G.L. §16-48.1-8.

48. *Green v. Mo. Pacific Railroad Co.*, 523 F.2d 1290 (1975).

49. *Hill v. Gill*, 703 F.Supp. 1034 (D.R.I. 1989), *aff'd* 893 F.2d 1325 (1st Cir. 1989). In 1993, the General Assembly limited the impact of this ruling by amending provisions in the commercial drivers' license law that related to disqualification for criminal convictions. *See* 1993 R.I. Pub. Laws, chapter 401.

50. *See*, e.g., *Smith v. Fussenich*, 440 F.Supp. 1077 (D. Conn. 1977); *Miller v. Carter*, 547 F.2d 1314 (7th Cir. 1977), *aff'd by an equally divided court*, 434 U.S. 356 (1978).

51. R.I.G.L. §36-4-38.

52. Rule 6.05(b).

53. R.I.G.L. §23-20.7.1-1.

54. *See*, e.g., *Earwood v. Continental Southeast Airlines*, 539 F.2d 1349, 1351 n.6 (4th Cir. 1976) (collecting cases).

55. *Carroll v. Talman Federal Savings & Loan Assn.*, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

56. *See*, e.g., *Laffey v. Northwest Airlines, Inc.*, 366 F.Supp. 763 (D.D.C. 1973), 374 F.Supp. 1382 (D.D.C. 1974), *aff'd in relevant part*, 567 F.2d 429 (D.C. Cir. 1976).

57. *See*, e.g., *Priest v. Rotary*, 634 F.Supp. 571 (N.D. Cal.1986); *EEOC v. Sage Realty Corp.*, 507 F.Supp. 599 (S.D.N.Y. 1981).

58. *Bradley v. Pizzaco of Nebraska*, 939 F.2d 610 (8th Cir. 1991).

59. *Kelley v. Johnson*, 425 U.S. 238 (1976).

60. *Cook v. Dept. of Mental Health, Retardation and Hospitals*, 10 F.3d 17 (1st Cir. 1993).

61. *Hodgdon v. Mt. Mansfield Co.*, 624 A.2d 1122 (Vt. 1992).

62. For example, *compare Briggs v. Northern Muskegon Police Dept.*, 563 F.Supp. 585 (W.D. Mich. 1983), *aff'd* 746 F.2d 1475 (6th Cir. 1984) *with Hollenbaugh v. Carnegie Free Library*, 436 F.Supp. 1328 (W.D. Pa. 1977), *aff'd* 578 F.2d 1374 (3rd Cir. 1978).

63. R.I.G.L. §28-5-1 *et seq*.

64. R.I.G.L. §28-5-24.

65. R.I.G.L. §28-5-6(i).

66. R.I.G.L. §28-5-7(2) and (3). However, religious organizations are exempt from the provisions in FEPA barring discrimination on the basis of sexual orientation. R.I.G.L. §28-5-6(13).

67. R.I.G.L. §28-5-6(13).

68. *See* R.I.G.L. §23-6-22.

69. *McCarthy v. Philadelphia Civil Service Comm'r*, 424 U.S. 645 (1976).

70. *NAACP, Newark Branch v. Harrison*, 749 F.Supp. 1327 (D.N.J. 1990).

71. *Grace v. City of Detroit*, 760 F.Supp. 646 (E.D. Mich. 1991).

72. *United Building & Construction Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984).

73. R.I.G.L. §36-4-30.

74. *Baldwin v. Montana Fish & Game Commission*, 436 U.S. 371, 386 (1978). *See* also *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (striking requirement that only residents may be members of the state Bar) and *Silver v. Garcia*, 760 F.2d 33 (1st Cir. 1985).

75. R.I.G.L. §28-48-1 *et seq*.

76. R.I.G.L. §28-48-6 and §28-48-7.

77. 29 U.S.C. §2601 *et seq*.

78. R.I.G.L. §23-6-22.

79. 29 C.F.R. §1630.13, §1630.14.

80. R.I.G.L. §5-37.3-1 *et seq*.

81. R.I.G.L. §5-37.3-9.

82. *Washburn v. Rite Aid Corp*., 695 A.2d 495 (R.I. 1997).

83. R.I.G.L. §28-6.7-1.

84. R.I.G.L. §28-6.7-3.

85. 42 U.S.C. §12114; R.I.G.L. §28-5-6(9).

86. R.I.G.L. §28-6.8-1.

87. R.I.G.L. §28-6.8-2.

88. R.I.G.L. §28-6.9-1.

89. R.I.G.L. §28-6.4-1.

90. 5 U.S.C. §552a.

91. Rule 8.02(C).

92. R.I.G.L. §12-28-11.

93. R.I.G.L. §28-50-1 *et seq*.

94. R.I.G.L. §28-50-5.

95. *See*, e.g., R.I.G.L. §28-5-7(5).

96. Two of the seminal U.S. Supreme Court cases governing free speech rights in public employment are *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). Rhode Island cases include *Pilkington v. Bevilacqua*, 590 F.2d 386 (1st Cir. 1979) and *Brule v. Southworth*, 611 F.2d 406 (1st Cir. 1979).