

(H. B. 70)

(No. 59)

(Approved August 8, 1997)

AN ACT

To regulate or facilitate controlled substances detection testing in the private work sector, through the establishment by the employer of testing programs to detect the use of controlled substances.

STATEMENT OF MOTIVES

The Government of Puerto Rico has the commitment and pressing interest to eradicate the use, possession, distribution and illegal trafficking of controlled substances. Even though the Commonwealth should avoid or minimize any interference in the private life of its citizens, the attainment of their personal liberties and the welfare of the society and its communities requires the adoption of any measures which lead to preserving its safety.

This legislative measure is directed to the detection and rehabilitation of the employee who is a user of controlled substances and the protection of the citizenry against possible hazardous effects as result of the work of an employee who is under the effect of controlled substances. In this manner, a healthy work place and safe working conditions free from the effects of controlled substances shall be maintained, for a better quality of the products and services which shall benefit the employees, the employers and the citizenry of Puerto Rico.

Article II, Section 16 of the Bill of Rights of the Constitution of the Commonwealth of Puerto Rico, establishes the protection of workers against risks to their health or personal integrity in their workplace or employment. The workplace in the private sector is an appropriate place to help fight the

wrongful use and illegal traffic of controlled substances through the establishment of programs which include testing to detect the use of these substances, and the corresponding rehabilitation programs that are needed to restore the health of employees affected by the use of drugs.

The illegal use of controlled substances is incompatible with the sound mental and physical health of the employees in the commercial sector and private industry of the Island, and it presents a grave risk to themselves, to the safety of their fellow workers and the citizenry in general. The establishing of programs to administer controlled substances testing is an effective mechanism to discourage the illegal use thereof and reduce the risk of a tragedy as a result of said use.

The Federal Supreme Court of the United States of America has issued decisions in which it has determined that the implementation of programs to detect controlled substances is constitutional when it is regulated for the sake of the State's legitimate interest to protect the public health and safety; or when the State does not impose on the private sector responsibilities of such a nature that convert private enterprise into an instrument of the state, and therefore, its actions do not constitute "state action".

The proposed legislation places Puerto Rico on the same level as sixteen states of the Nation, which have passed legislation related to the use of controlled substances on the job in the private sector, to wit: Connecticut, Florida, Georgia, Hawaii, Iowa, Louisiana, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, North Carolina, Oregon, Utah and Vermont.

The establishing of programs to administer drug tests is an effective mechanism to discourage the illegal use thereof in the workplace, thus minimizing the risk of accidents and enhancing the quality of the services.

Likewise, this legislation intends to legalize and establish certain criteria to enable employers who have not developed and implemented programs for the detention of drug use in the workplace prior to the approval of this Act, to establish the same. The Act does not apply to employees covered under the statute which regulates the controlled substances detection tests of public employees. Neither should it be construed in any way that this legislation restricts the controlled substances detection tests conducted at present in the private work sector; its purpose is to enable the implementation of controlled substances detection tests. In this manner, companies are encouraged to be drug-free work areas.

BE IT ENACTED BY THE LEGISLATURE OF PUERTO RICO:

Section 1.- Title

This Act shall be known as an "Act to Regulate Controlled Substances Detection Tests in the Private Work Sector".

Section 2.- Statement of Purpose

The present legislation has as its purpose to detect the use of controlled substances by employees and candidates for employment in the private work sector. Likewise, it intends to promote the health and safety of workers and, consequently of the community in general, providing the safeguards needed for the protection of the intimacy and personal integrity of the individual thus affected. To such effects, the employers of Puerto Rico are hereby authorized and exhorted to implement controlled substances detection programs, and by doing so, comply with the provisions of this Act. The plan established by the employer shall have the purpose of educating and informing his/her employees of the health hazards associated to the unlawful use of controlled substances.

Furthermore, the employer shall provide the employee with a program for the attention, treatment, and guidance for his/her rehabilitation.

Likewise, this legislation intends to approve and establish certain criteria to enable employers who have not developed and implemented programs for the detection and use of drugs in the workplace prior to the approval of this Act, to establish the same. The Act does not apply to employees covered by the statute which regulates the controlled substances detection tests of public employees. Neither should it be construed that this legislation restricts the drug testing conducted at present in the private work sector; its purpose is to enable, in some cases and regulate in others the implementation of controlled substances detection tests. In this manner, companies are encouraged to be drug-free work areas.

Section 3.- Definitions.-

The following words shall have the meaning indicated below:

- (a) "Accident" is any unexpected occurrence or action resulting from an act or function of an employee, which causes serious damage to property or physical harm to a person.
- (b) "Candidate for employment" means any person who applies to an employer for a job, whether verbally or in writing, and who is offered a job, even if conditionally.
- (c) "Drugs" or "Controlled Substances" are those included in Schedules I and II of Section 202 of Act No. 4 of June 23, 1971, as amended, known as "Controlled Substances Act of Puerto Rico" or any other legislation of the Commonwealth of Puerto Rico or the United States of America, with the exception of the use of controlled substances by medical prescription or any other legal use.

(d)"Employee" is any person employed by an employer, with or without remuneration in any workplace. It includes temporary and provisional employees, those on probation or regular employees.

(e)"Laboratory" is any entity engaged in performing clinical and chemical forensic analyses, which processes tests for the detection of drugs, substantially using the guidelines and parameters established by the National Institute of Drug Abuse (N.I.D.A.)

(f)"Sample" means a sufficient amount of urine or any other bodily fluid or tissue obtained in a non-invasive manner and is determined to meet the reliability and accuracy criteria accepted by laboratories for the performance of initial and corroborative testing, and for the retention of a portion to allow the employee or candidate for employment to perform his/her own corroboration test.

(g)"Unjustified Refusal" shall constitute the refusal of a person to submit to the tests for the detection of controlled substances or to cooperate with the processing of such tests, such as without excluding others, failing to show up, without justification, at the place where the sample is to be taken; abandoning the place where the sample is to be taken; clearly stating his/her refusal to submit to the procedure; failing to obey orders or follow the instructions of the laboratory or the official in charge to produce the sample adequately; or altering the sample.

(h)"Employer" is any natural or juridical person, and any person who represents such natural or juridical person, or who exercises

authority over any employment or employee, excluding the Government of the Commonwealth of Puerto Rico and its municipalities, and any department, agency, instrumentality or dependency thereof.

(i)"Controlled Substances Detection Test Program" means a program to detect the use of controlled substances, which meets the requirements established in Sections 5 and 6 of this Act.

(j)"Drawing" shall consist of the placing of the employee's numbers in order to select by lottery casting lots, or any other method, those employees that shall have to take the test by mere chance.

(k)"Individualized Reasonable Suspicion" is the moral conviction that a specific person is under the effects, the influence, or is a drug user, regardless of whether the fact is established afterwards or not. Said suspicion must be grounded on observable and objective facts, such as: a) direct observation of the use or possession of controlled substances; b) physical symptoms which indicate being under the influence of controlled substances; c) a persistent pattern of abnormal conduct or erratic behavior in the workplace. Reasonable and individualized suspicion must be established by at least two (2) supervisors of the employee, of which one (1) shall be a direct supervisor.

Section 4.- Liability of the employer.-

A. An employee or candidate for employment, as the case may be, shall have a cause of action against an employer who has a

controlled substance detection program, under the following circumstances:

(1) The employer took disciplinary action against the employee, or refused to employ a candidate for employment, based on an erroneous test result, and the employer relied upon said result, through fraud, fault or negligence.

(2) The employer who damages the reputation of the employee or candidate for employment by revealing the test results, through fraud, fault or negligence.

B. The employee who suffers damages as a result of a drug test performed on his/her sample, and does not file suit against his/her employer for fraud, fault or negligence, may however, avail him/herself of the benefits of Act No. 45 of April 18, 1935, as amended.

Section 5.- Testing Program for the Detection of Controlled Substances.-

A program for the detection of controlled substances shall meet the following requirements:

(a) Tests shall be conducted in a uniform and consistent manner for all employees and candidates for employment; and pursuant to the terms of a written program, adopted by the employer and notified to the employees through delivery of a copy of the same, which shall contain its effective date and shall identify the law that authorizes its adoption. This notice shall be given at least sixty (60) days before its effective date, and to candidates for employment upon filing a job application with the employer. The same terms and conditions shall apply to notices and delivery of

copies made with respect to subsequent amendments thereto. However, any testing program for the detection of controlled substances established and implemented prior to the effective date of this Act and which meets these requirements, shall be deemed to be a valid Testing Program.

(b) Tests shall be administered according to the program adopted by the employer, through regulations, which shall be notified to all employees and candidates for employment. The regulations shall contain the following:

(1) A statement on the illegal use of controlled substances which includes a description of the sanctions and penalties that apply to the production, distribution, possession or illegal use of controlled substances under the laws of the Government of Puerto Rico and the United States of America.

(2) An indication to the effects that the possession, distribution, use, consumption and illegal traffic of controlled substances is conduct forbidden in the company.

(3) A plan developed by the employer to educate and inform the employees on the health risks associated to the illegal use of controlled substances.

(4) The adoption and description of the programs for assistance, treatment or orientation on the rehabilitation available to the employees.

(5) The employer's rules of conduct on the use of controlled substances by his/her employees and a description of the sanctions that said employer shall impose on the employees if such rules of

conduct are violated or if the test is positive for the use of a controlled substance. Such rules shall be uniform and non-discriminatory. The employer may impose sanctions on employees for violations of said rules of conduct subject to the provisions of Act No. 80 of May 30, 1976, as amended. The first positive test result of the use of controlled substances shall not constitute just cause for dismissal of an employee without first requiring and allowing the employee to attend an appropriate rehabilitation program. The employer may also require an employee with a positive test result to periodically submit to additional tests as part of the rehabilitation program. In the event that the employee expressly refuses to participate in said rehabilitation program, or if the result of said additional tests is positive, the employer may impose the corresponding disciplinary actions, pursuant to the rules of conduct. In imposing said disciplinary measures, the employer shall do so taking into account the relationship between the employee's conduct and his/her functions, its effect on the proper and normal function of the enterprise, and the risk to the safety of other employees and the public in general. The unjustified refusal of an employee to submit to a urine test, when it is so required pursuant to the provisions of this Act, shall constitute prima facie evidence that the result would have been positive, and shall result in the application disciplinary measures. All employees who have been granted the opportunity to participate in an assistance and rehabilitation program in order to fight the use of controlled

substances shall have the obligation to collaborate and comply with all the requirements of the program in order to achieve their rehabilitation within the shortest term possible. Noncompliance with any of the obligations imposed by the program shall constitute conduct that could bring about the imposition of disciplinary measures.

(6)A warning that the employees or candidates for employment shall be subject to tests for the detection of controlled substances.

(7)A detailed description of the procedures to be followed to conduct the tests, including the mechanism for the settlement of disputes over the result of said tests.

(8)A provision to the effects that any information, interview, report, statement or memorandum on the result of the tests shall be deemed to be confidential information. No positive result of controlled substances detection tests administered by order of the employer shall be used as evidence in a criminal suit against the employee, unless it is used by said employee as evidence in his/her defense.

(c)The employer shall defray the expenses of the controlled substances detection tests. The employer shall deem as working time, the time needed to submit to the tests and shall compensate the employees for such time, correspondingly. The absences of an employee to attend a rehabilitation program may be charged, in the first place, on sick leave, and then on vacation leave. Should all paid leave be exhausted, the employee shall be entitled to leave without pay for a maximum of thirty (30) days.

(d)The drug tests shall be made through an urine sample, except for those circumstances in which it is not possible to take the same and shall be administered in accordance with scientifically accepted analytical and sample custody chain procedures, so that the privacy of the employee may be protected to the maximum, and pursuant to the Mandatory Guidelines for Federal Workplace Drug Testing Program. The sample shall not be submitted to any type of test other than that which is strictly necessary for the detection of controlled substances. The urine test shall be used, for which there shall be no on site observer while the employee provides the sample; but one person shall take the sample handed by the employee at the exact moment that the employee abandons the bathroom. For greater reliability, the temperature of the sample shall be taken in the presence of the employee who has been submitted to the test, as a measure to determine if the sample has been adulterated. In the event that the adulteration of a sample is determined, the same shall be discarded and the employee shall be requested to provide a new one, this time in the presence of a person of his/her same sex, who is a member of the laboratory personnel.

(e)The tests made on the sample shall be conducted pursuant to scientifically acceptable analytical procedures for such type of test, by a certified laboratory, as recommended in the Mandatory Guidelines for Federal Workplace Drug Testing Program. Every sample with a positive result shall be submitted to a second corroborative analysis by the gas spectrometry chromatography

method. Only after having obtained a positive corroborated result of the presence of opiates in the urine, shall a supervising physician, contracted by the laboratory conducting the tests, ask the person whose result was positive if he/she is taking any medication that could have some effect on the result of the test, provided there is no test that will allow the differentiation of the different types of opiates by analytical methods.

(f)The employee shall be advised in writing that he/she is entitled to contract another laboratory to obtain a second result from the same sample, and should he/she wish to do so, the minimum amount of the obtained sample needed shall be transferred to an independent laboratory contracted by him/her, to conduct the tests.

(g)If the test conducted by the employer is positive, and the second test made at the request of the employee is negative, the employer may suggest three laboratories, of which the employee must choose one, so that a third test can be conducted at the expense of the employer. The result of this third test shall be binding on both parties.

(h)Every employee may be submitted to a maximum of two tests each year, unless a duly corroborated positive result has been obtained from one of such tests or as part of a counseling, treatment or rehabilitation program.

(i)Before the employer can take any disciplinary action based on the positive result of a test, said result shall have to be verified through a confirming laboratory test. The employee or candidate for employment shall have the opportunity to notify said

laboratory of any information which is relevant to the interpretation of said result, including the use of prescribed or over the counter drugs.

Section 6.- Confidentiality of results.-

All the information and documentation compiled on an employee, including the results of the test to detect the presence of controlled substances, shall be confidential and shall be kept separate from the personnel file. Said information shall not be offered or admitted in evidence in a criminal suit against the employee, unless it is the employee who offers the same. The employers, laboratories, and employees of the rehabilitation program who have access to said information shall maintain the confidential nature thereof. The information shall not be disclosed, except to:

- (a) the employee who has been submitted to the test
- (b) any representative authorized in writing by the employee
- (c) employees designated by the employer for such purposes
- (d) provides of treatment and rehabilitation plans for the user of drugs when the employee is under a treatment and rehabilitation plan.

The employer shall not require the laboratory to conduct other tests on the sample obtained from the employee not related to the detection of controlled substances. Neither may the laboratory conduct any analysis on the sample on their own initiative, other than that required by the employer.

Section 7.- Activities in which employees, candidates to re-entry and candidates for employment shall be subject to tests for the detection of controlled substances.

All employees, candidates to re-entry and candidates for employment shall have the obligation to submit to mandatory tests in the following activities:

- (a) Employees working in the gunsmith business;
- (b) Every person who, for pay, controls or drives any railroad train, motor vehicle used to transport passengers regardless of its

capacity; any motor vehicle used to haul cargo on any public road; or any vehicle used to transport passengers or cargo by air or water;

(c) Security Guards;

(d) Employees whose functions include the handling and control of drugs and controlled substances, explosives, gases, dangerous, inflammable, radioactive, toxic, high voltage materials or similar substances.

Section 8.- Circumstances under which tests may be made

In all those cases in which Section 7 of this Act is not applicable, the employer may require or request employees, candidates for employment and candidates to re-entry, to submit to a controlled substances detection test as a condition to continue in their employment, under the following circumstances, among others:

(a) When an accident occurs in the workplace, attributable to the employee, in connection with his/her functions and during working hours. The employee shall not be submitted to the controlled substances detection tests if he/she is not in full control of his/her mental faculties because of the accident, unless a medical order provides otherwise;

(b) When there is reasonable individualized suspicion that the employee is using controlled substances. The test shall be made within the term of twenty-four (24) hours;

(c) As a pre-condition for recruitment and as part of a general physical-medical examination, required from all candidates for employment;

(d) Follow up tests: If an employee, in the course of his/her work, is admitted to a rehabilitation program, the employer may require such employee to submit to follow-up tests as needed.

Section 9.- Testing Program by Drawing

Every employer may establish a testing program for the detection of controlled substances to promote the health and welfare of his/her employees, through to random selection methods, chosen objectively.

Section 10.- Labor organizations

Should there be a labor organization representing workers in an appropriate collective bargaining unit, duly certified by the national or local Labor Relations Board, the procedure for the administration of drug testing shall be subject to the provisions of the collective bargaining agreement in force on the date of approval of this Act. Once the term of the agreement has expired, the provisions of this Act shall be fully applicable.

Section 11.- Penalty.-

Any person who, with malice and premeditation, discloses any information described as confidential in this Act, other than what is provided in Section 6, shall incur a misdemeanor.

Section 12.- Severability Clause

Should any clause, paragraph, section or part of this Act be declared unconstitutional by a court of competent jurisdiction, the judgment shall not affect nor invalidate the rest of this Act and its effect shall be limited to the clause, paragraph or part declared unconstitutional.

Section 13.- Effectiveness.-

This Act shall take effect one hundred and eighty (180) days after its approval.

May 5, 1998

José A. Figueroa-Lugo, Director of the Office of Legislative Services of the Legislature of Puerto Rico, hereby certifies to the Secretary of State that he has duly compared the English and Spanish texts of Act No. 59 (H.B. 70) of the 1st Session of the 13th Legislature of Puerto Rico, entitled:

AN ACT to regulate or facilitate controlled substances detection testing in the private work sector, through the establishment by the employer of testing programs to detect the use of controlled substances,

and finds the same are complete, true and correct versions of each other.

José A. Figueroa-Lugo

