



Rhode Island Society for Human Resource Management State Chapter

Statement of
Gregory Tumolo, Esq., Director of Legislative Affairs
On behalf of the Rhode Island Society for Human Resource Management State Chapter

Submitted to the Senate Judiciary Committee
S2430 – An Act Relating to Food and Drugs – Rhode Island Cannabis Act
March 14, 2022

To the Honorable Members of the Senate Judiciary Committee:

My name is Gregory Tumolo, Esq. I am a partner with the law firm of Lewis, Brisbois, Bisgaard & Smith, LLP in Providence and a member of the firm’s Labor and Employment and Employment Advice and Counseling practice groups. I have been a practicing employment law attorney for nearly fourteen years. Since 2017, I have had the pleasure of serving in the role of Director of Legislative Affairs for the Rhode Island Society for Human Resource Management State Chapter (“RI SHRM”).

RI SHRM is an affiliate of the Society for Human Resource Management (“SHRM”), the world’s largest HR professional society representing more than 300,000 members in more than 165 countries around the world. RI SHRM is a volunteer organization representing the interests of more than 500 human resource professionals throughout the State of Rhode Island. Our members are a true cross-section of the Rhode Island economy, coming from such diverse sectors as education, government, healthcare, hospitality and customer service, manufacturing, non-profit, professional services, small business, and technology. Through our exceptional programming and our legislative advocacy efforts over the years, we have become the trusted “voice” of the Rhode Island HR community.

On behalf of our members, I am grateful for the opportunity to provide the Senate Judiciary Committee with this written testimony regarding **S2430 – An Act Relating to Food and Drugs – Rhode Island Cannabis Act**.

Without a doubt, the legalization of marijuana for adult recreational use will profoundly change the workplace as we know it. As marijuana becomes as readily obtainable as alcohol (if not more so), it will become increasingly difficult for Rhode Island employers to provide a healthy and safe environment for their employees and business invitees to their premises, such as customers and clients. Moreover, the job duties of human resource professionals—already challenging due to the “patchwork quilt” of federal, state, and local employment laws that they administer every day—

will become even more difficult. In fact, many HR professionals who have been pushed to the breaking point by the ongoing COVID-19 pandemic may choose to leave the profession altogether rather than confront the adverse effects of legalization.

RI SHRM members know that they will be the ones called upon when an employee is found to be using or in possession of legal marijuana that they purchased at the local dispensary. RI SHRM members know that they will be the ones called upon when a manager or supervisor suspects that an employee is impaired because of their private, lawful, on-duty consumption of a marijuana edible before work. RI SHRM members know that they will be the ones called upon when a manager or supervisor wants to impose disciplinary action for a marijuana-related infraction, such as a work-related forklift accident involving an employee with the pungent odor of marijuana clinging to their clothing. Their “voice” needs to be heard during the ongoing public debate over legalization.

The current version of the legalization bill known as the Rhode Island Cannabis Act (the “Act”) reflects some of the valuable contributions made by RI SHRM during previous legislative sessions. We are grateful that the members of the General Assembly have been receptive to our comments and our concerns. However, the Act could be further improved in the following ways:

1. **The Act must address the acute need for “reasonable grounds” education and training among Rhode Island employers:** Rhode Island has the distinction of having one of the most burdensome drug testing laws in the country. Employers must jump through several procedural “hoops” both before and after an employee is asked to submit to a drug test.

At the heart of Rhode Island’s drug testing law is the concept of “reasonable grounds.” Before requesting that an employee submit to a drug test of their urine, blood, or saliva, the employer must have “reasonable grounds” to believe that the employee may be “under the influence” of a controlled substance that may be impairing their ability to work. “Reasonable grounds” must be based on specific, contemporaneous, and documented observations about the employee’s job performance, appearance, behavior, or speech. This is a high bar to clear.

Despite being on the “front lines” of the fight to keep our workplaces safe, most RI SHRM members have received no formal education or training on how to identify the indicia that give rise to “reasonable grounds” that an employee may be “under the influence” of a controlled substance like marijuana. Moreover, as potent forms of “concealed consumption” proliferate without the telltale odor of marijuana smoke (e.g., THC gummies, cookies, sodas, and other edibles), it will become even more challenging for HR professionals to make the detailed and specific observations that are legally required before sending someone for a test.

Considering the harsh civil and criminal penalties for violations of our drug testing law—including the potential for misdemeanor criminal liability and up to one year in prison—HR professionals untrained in “reasonable grounds” may err in favor of allowing a potentially impaired employee to remain on the job or hesitate before sending a potentially

impaired employee for testing. Without additional training on “reasonable grounds,” the legalization of marijuana for adult recreational use will make all of our workplaces less safe.

RI SHRM recommends that a portion of the revenue generated from the sale of legal marijuana should be set aside to help employers to address this training gap. We recommend that the General Assembly establish an employer assistance fund focused on promoting compliance with Rhode Island’s drug testing law. The monies appropriated to the employer assistance fund would be used to provide Rhode Island employers with free, high quality, and voluntary “reasonable grounds” training for their “front line” managers, supervisors, and HR professionals. Through increased access to high quality training resources, Rhode Island employers will be better equipped to maintain a healthy and safe working environment post-legalization.

2. **The Act must define the legal standard “under the influence” of marijuana:** Even if General Assembly sees fit to appropriate monies for much-needed “reasonable grounds” training (as is recommended by RI SHRM and leading members of the business community, including the Rhode Island Business Coalition), the Act in its current form does not define the legal standard “under the influence” of marijuana. RI SHRM has taken the eminently reasonable position that this legal standard must be clearly defined in the law for employers and HR professionals to apply it.

Looking to other jurisdictions for guidance, RI SHRM proposes that the “under the influence” standard should be defined as follows:

“Any person who submits to a drug test administered in accordance with §28-6.5-1 that reveals the presence of cannabis metabolites in the person’s system at or above the initial cutoff concentration for cannabis metabolites established by the federal Department of Transportation in accordance with 49 CFR §40.87 shall conclusively be determined to be ‘under the influence of cannabis’ for purposes of this chapter.”

The initial cutoff concentration for marijuana metabolites established by the federal Department of Transportation is an objective, measurable, scientifically validated standard of impairment that employers, employees, and HR professionals can easily understand and apply. If an employee is sent for testing based on “reasonable grounds,” any drug test result that yields marijuana metabolites at or above the established DOT cutoff concentration would conclusively be determined to meet the statutory “under the influence” standard. Based on this failed drug test, the employee would be subject to progressive discipline by their employer, up to and including termination of employment.

3. **Employers with “safety-sensitive” job functions must be permitted to administer random drug tests:** As marijuana usage becomes increasingly common among the Rhode Island workforce, employers that employ workers performing “safety sensitive” job duties need assurances that their employees are reporting to work fit for duty. However, Rhode Island’s existing drug testing law effectively ties their hands. Section 28-6.5-1 prohibits

all forms of random drug testing, including for those employees performing the most dangerous jobs.

In conjunction with passage of the Act, RI SHRM urges the General Assembly to revisit the “reasonable grounds” drug testing law to allow employers to randomly screen employees engaged in jobs, occupations, or professions that involve work that is “hazardous, dangerous, or essential to public welfare and safety.”¹ Otherwise, even the highest quality and most readily accessible “reasonable grounds” training may not be sufficient to keep dangerously impaired workers out of our workplaces. Training and random testing must go hand in hand.

4. **The Act must define the term “workplace” broadly to include any physical location where an employee is performing work:** As currently drafted, the Act states that employers are not required to accommodate the medical use of marijuana in any “workplace” and that they are free to adopt drug use policies prohibiting the use or possession of marijuana in any “workplace.” But what does the term “workplace” mean?

Although not defined in the Act, the drafters likely envisioned a physical work location outside of the employee’s home and under the control of the employer, such as a manufacturing facility, an office, a restaurant, or a retail store. Such a narrow conception of “workplace” may no longer accurately reflect the realities of how many Rhode Islanders perform their work.

The COVID-19 pandemic has resulted in a dramatic shift toward remote work and hybrid work arrangements. Two years after the global pandemic was first declared, many Rhode Islanders continue to work remotely for some or all of their workweek. The shift away from a physical work location under the employer’s control has focused attention on a legal

¹ RI SHRM has proposed the following non-exhaustive list of job functions that it considers “hazardous, dangerous, or essential to public welfare”:

- (1) the handling, packaging, processing, storage, disposal, or transport of hazardous materials;
- (2) the operation of a motor vehicle, aircraft, or motorboat;
- (3) the operation of equipment, machinery, or power tools;
- (4) repairing, maintaining, or monitoring the performance or operation of any equipment, machinery or manufacturing process, the malfunction or disruption of which could result in injury or property damage;
- (5) performing first responder duties;
- (6) direct patient care or direct childcare;
- (7) dispensing pharmaceuticals;
- (8) the operation, maintenance or oversight of critical services and infrastructure including, but not limited to, electric, gas, and water utilities, power generation or distribution;
- (9) the extraction, compression, processing, manufacturing, handling, packaging, storage, disposal, treatment or transport of potentially volatile, flammable, combustible materials, elements, chemicals or any other highly regulated component; or
- (10) carrying a firearm.

RI SHRM proposes that the determination of whether a job function meets the “hazardous, dangerous, or essential to public welfare and safety” standard must be made by the employer in its sole discretion. In the alternative, this determination could be made by the Rhode Island Department of Labor and Training. In neighboring Connecticut, employers may request that the Labor Commissioner of the State of Connecticut designate a particular occupation as “high risk” or “safety-sensitive” See <https://www.ctdol.state.ct.us/wgwkstnd/laws-regs/highrisk-regs.htm>

exposure that many Rhode Island employers did not know that they had pre-COVID: the risk of work-related accidents and injuries sustained in an employee's home.

RI SHRM believes that the term "workplace" should have an expansive definition to reflect that many Rhode Islanders are undertaking and performing work tasks at home and other remote locations. Employees should be prohibited from undertaking or performing any work task for an employer while "under the influence" of marijuana, regardless of the physical location where the work is performed.

The same workplace drug use policy that prohibits an employee from possessing or using marijuana on the production floor or in a corporate office should apply with equal force to an employee's home office or other remote location where an employee is working. By extending the reach of workplace drug use policies to an employee's home office and other remote work locations, employers will have a better argument that an injury that occurs following an employee's private, lawful use of marijuana is outside the scope of employment and, therefore, not compensable by workers' compensation insurance.

RI SHRM stands at the ready to assist the General Assembly to improve the Act (1) to promote access to free, high quality, and voluntary "reasonable grounds" training for managers, supervisors, and HR professionals; (2) to clarify the legal definition of "under the influence" of marijuana by linking it to the established DOT cutoff concentration for marijuana metabolites; (3) to permit random drug testing for those employees performing jobs, occupations, or professions that involve work that is "hazardous, dangerous, or essential to public welfare"; and (4) to establish a broad definition of "workplace" that takes into account work performed at home and other remote locations. With these changes, many of the worst effects of legalization will be mitigated.

Please feel free to contact me to continue this important conversation.

Respectfully submitted by:

/s/ Gregory Tumolo

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