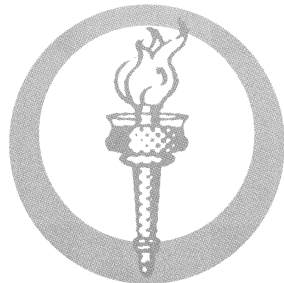


Your Rights to Workplace Privacy in Rhode Island

4th Edition

A Handbook Published by the
American Civil Liberties Union
Foundation of Rhode Island



Your Rights to Workplace Privacy in Rhode Island

4th Edition

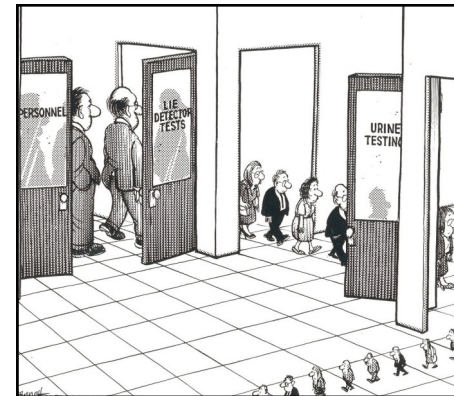


TABLE OF CONTENTS

Introduction	1
Being Questioned for a Job	2
Drug Testing	5
Honesty and Personality Testing	8
Searches and Surveillance	10
Criminal Record Checks	15
Personal Lifestyle and Off-Duty Activities	17
Medical Privacy	22
Miscellaneous Privacy Issues	24
“Blowing the Whistle”	26
Endnotes	28

The American Civil Liberties Union Foundation of Rhode Island is a private, non-profit organization dedicated to preserving and protecting the civil liberties guarantees found in the Bill of Rights.

While the ACLU, as a general rule, only deals with civil liberties complaints against the government, it has had a longstanding interest in issues relating to privacy in the workplace in both the public and the private sector.

Cartoon in the Table of Contents by Clay Bennett,
St. Petersburg Times
Reprinted with permission

*American Civil Liberties Union Foundation of Rhode Island
128 Dorrance Street, Suite 220
Providence, RI 02903
www.riaclu.org*

© October, 2011

port wrongdoing in the course of their official duties, as opposed to their capacity as a private citizen. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Thus, whether the First Amendment (as opposed to state and federal statutes) provides protection from retaliation in any particular instance will depend on an analysis of the employee's official duties. See, e.g., *Decotiis v. Whitmore*, 635 F.2d 22 (1st Cir. 2011). At least one court has held that, notwithstanding *Garcetti*, an employee's work-related *testimony* in legal proceedings remains protected by the First Amendment. *Reilly v. Atlantic City*, 532 F.3d 216 (3rd Cir. 2008).

Introduction

The workplace is where most adults spend roughly half their waking hours. Further, 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 drug testing, telephone monitoring, video surveillance 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 employers' actions in this regard, due in 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, the passage of new statutes and the ever-increasing march of technology in the workplace, 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 upon 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.

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, gender identity or expression, 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.⁴

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

115. R.I.G.L. §28-6.9-1.

116. The advisory letter is available online at <http://www.eeoc.gov/eeoc/foia/letters/2010/titlevii-employer-creditck.html>.

117. Sections 604, 606 and 615 of the Fair Credit Reporting Act (FCRA) spell out these obligations. The law is codified at 15 U.S.C. § 1681 *et seq.*

118. "EEOC Compliance Manual: National Origin Discrimination," Number 915.003, Equal Employment Opportunity Commission, December 2, 2002. Available online at: <http://www.eeoc.gov/policy/docs/national-origin.html>.

119. Compare *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), reh'g en banc denied, 13 F.3d 296 (9th Cir. 1993), cert. denied, 114 S.Ct. 2726 (1994) (upholding English-only policy) with *EEOC v. Premier Operator Services, Inc.*, 113 F. Supp. 1066 (N.D. Tex. 2000) and *EEOC v. Synchro-Start Products, Inc.*, 29 F. Supp. 2d 911 (N.D. Ill. 1999)(striking down English-only policies).

120. R.I.G.L. §23-13.2-1. The federal law was enacted in 2010 as part of the broad health care reform act, Pub. L. 111-148, §4207.

121. R.I.G.L. §28-6.4-1.

122. 5 U.S.C. §552a.

123. Rule 8.02(C). The state personnel regulations are available online at <http://www.diversity.ri.gov/personnel/personnel2.html>.

124. R.I.G.L. §12-28-10.

125. R.I.G.L. §28-50-1 *et seq.*

126. R.I.G.L. §28-50-5.

127. *See, e.g.*, R.I.G.L. §28-5-7(5); 42 U.S.C. § 2000e-3(a). Numerous federal laws, such as the Fair Labor Standards Act, 29 U.S.C. §215(a) (3), the National Labor Relations Act, 29 U.S.C. §158(a)(4), and the Occupational Safety and Health Act, 29 U.S.C. §660(c), also contain broad prohibitions against employee retaliation for reporting violations of the protections contained in those laws.

128. As the result of a 2006 U.S. Supreme Court decision, a government employee's ability to challenge retaliatory conduct on First Amendment grounds has been greatly limited. In that case, the Court held that the Constitution does not protect public employees who re-

95. R.I.G.L. §28-48-1 *et seq.*
96. R.I.G.L. §28-48-6 and §28-48-7.
97. 29 U.S.C. §2601 *et seq.*
98. R.I.G.L. §23-6.3-11.
99. 29 C.F.R. §§1630.13, 1630.14.
100. *Matson v. Board of Education of the City School District of New York*, 631 F.3d 57 (2nd Cir. 2011).
101. R.I.G.L. §5-37.3-1 *et seq.*
102. *Washburn v. Rite Aid Corp.*, 695 A.2d 495 (R.I. 1997).
103. R.I.G.L. §5-37.3-9.
104. R.I.G.L. §5-37.3-4.
105. R.I.G.L. §28-6.7-1.
106. R.I.G.L. §28-6.7-3.
107. Public Law 110-233.
108. 42 U.S.C. §12114. Rhode Island's Fair Employment Practices Act provides similar protection, as it generally incorporates the ADA's definitions of disability.
109. R.I.G.L. §21-28.6-4(b).
110. R.I.G.L. §21-28.6-7(b)(2).
111. R.I.G.L. §28-6.8-1.
112. R.I.G.L. §28-6.8-2.
113. "EEOC Enforcement Guidance: Disability Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act," No. 915.002, Equal Employment Opportunity Commission, July 27, 2000. Available online at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.
114. *See, e.g.*, EEOC Opinion letter dated June 24, 2011, "ADA and GINA: Incentives for Workplace Wellness Programs." Available online at: <http://www.employmentlawmatters.net/uploads/file/Wellness%20programs-EEOC%20Opinion%20Letter-6-24-11.pdf>.

or physical disabilities, and medical questions generally perform that illegal function. In addition, a federal law known as the Americans with Disabilities Act (ADA),⁵ 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.⁶

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.

After employment begins, an employer may make disability-related inquiries and require medical examinations, but only if they are job-related and consistent with business necessity.⁷

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.⁸

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.⁹ The only exception is for law enforcement agency positions "or positions related" to such agencies. The law does not, however, prevent employers from inquiring about any *convictions* a job applicant may have.¹⁰

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.”¹¹

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.¹² Such policies would also be discriminatory under state law.

Q. Does the Constitution itself set any limits on intrusive questions that a government employer can ask?

A. Most protections that a job applicant will have in this context are those created by statute, not the Constitution. In a recent case, the U.S. Supreme Court assumed, without deciding, that there is a constitutional privacy interest in “avoiding disclosure of personal matters.” But the Court also held that the government, as an employer, has a fairly broad hand in making inquiries of job applicants. In this instance, the Court found no constitutional violation in a widely-used federal job application form that asked applicants, among other things, to provide information about any drug treatment or counseling they had received, and that asked their references broad open-ended questions about the applicant’s “honesty or trustworthiness.”¹³

But the decision does not rule out the possibility of raising constitutional claims in extreme cases. For example, one court has held that a female police officer candidate’s constitutional right to privacy was violated by intrusive inquiries about her personal sexual activities.¹⁴

Cir. 2004). For a ruling more protective of employees’ rights, see *EEOC v. Red Robin Gourmet Burgers*, 2005 WL 2090677 (W.D.Wash. 2005).

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

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

83. 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).

84. R.I.G.L. §28-5-1 *et seq.*

85. R.I.G.L. §28-5-24.

86. R.I.G.L. §28-5-6(7)(i).

87. R.I.G.L. §28-5-7(2) and (3). However, religious organizations are exempt from FEPA provisions barring discrimination on the basis of sexual orientation. R.I.G.L. §28-5-6(7)(ii). A somewhat broader religious exemption appears in a new statute adopted by the General Assembly establishing state recognition of “civil unions,” but the impact of this discrepancy remains unclear. R.I.G.L. §15-3-1-5, P.L. 11-198.

88. R.I.G.L. §28-5-6(15).

89. See R.I.G.L. §23-6.3-11.

90. R.I.G.L. §28-5-6(10). Under certain circumstances, such discrimination may also violate federal law. See *Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008).

91. R.I.G.L. §45-2-15.2. The law continues to allow residency requirements for city or town managers and administrators.

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

93. R.I.G.L. §36-4-30. [Repealed by P.L. 2007, chap. 332, §2.]

94. The U.S. Supreme Court has spoken of the Constitution’s protection of a person’s right “to pursue a livelihood in a State other than his own.” *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)

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.

68. 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).

69. R.I.G.L. §36-4-38.

70. Rule 6.05(b). Available online at <http://www.diversity.ri.gov/personnel/personnel2.html>.

71. R.I.G.L. §23-20.10-14.

72. See, e.g., *Earwood v. Continental Southeast Airlines*, 539 F.2d 1349, 1351 n.6 (4th Cir. 1976) (collecting cases). But see *infra* regarding state law protections against discrimination on the basis of gender identity.

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

74. 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).

75. 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).

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

77. *EEOC v. Alamo Rent-A-Car*, 432 F.Supp.2d 1006 (D.Ariz. 2006); *Haqq v. Pa. Dept. of Public Welfare*, 2010 WL 1253452 (E.D. Pa. 2010); *EEOC v. White Lodging Services Corp.*, 2010 WL 1416676 (W.D. Ky. 2010). But see *EEOC v. GEO Group*, 616 F.3d 265 (3rd Cir. 2010) (upholding a ban on wearing of khimars by prison employees, based on security concerns).

78. R.I.G.L. §28-5-6(10).

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

80. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st

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 well-defined occupations, all random drug testing is banned under this law.¹⁵

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.¹⁶ 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 performance 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.¹⁷

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. 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 result). Any positive test results must 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 that complies with the drug testing statute.

Finally, and significantly, the testing must have a remedial, not punitive, purpose. It is illegal under the statute 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.¹⁸

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 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.¹⁹

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.²⁰

There is a third, and very limited, exception as well for "International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers and its signatory contractors" jointly participating in a national substance abuse program that prequalifies workers for employment in that field. However, participation in the program must be voluntary, and there are limits on the penalties that can be imposed for a positive drug test.²¹

In addition, there are some federally-regulated occupations where the federal government has mandated the implementation of random drug testing. When the federal

51. 18 U.S.C. §2510 *et seq.*

52. *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).

53. *Walden v. City of Providence*, 596 F.3d 38 (1st Cir. 2010).

54. *Rogers Electric Inc.*, 346 N.L.R.B. 53, February 24, 2006.

55. R.I.G.L. §28-6.12-1.

56. R.I.G.L. §9-1-28.1.

57. 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.

58. *See, e.g., National Steel Corp. v. NLRB*, 324 F.3d 928 (7th Cir. 2003).

59. *Vega-Rodriguez v. Puerto Rico Telephone Company*, 110 F.3d 174, 180 (1st Cir. 1997); *Rosario v. United States*, 538 F.Supp.2d 480 (D.P.R. 2008); *Doe v. Luzerne Cty.*, 2011 WL 4823387 (3rd Cir. 2011).

60. *See, e.g., Alexandre v. New York City Taxi and Limousine Comm'n*, 2007 WL 2826952 (S.D.N.Y. 2007); *Elgin v. St. Louis Coca-Cola Bottling Co.*, 2005 WL 3050633 (E.D. Mo. 2005); *Haggins v. Verizon New England*, 2011 WL 3129761 (1st Cir. 2011).

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

62. *See, e.g., R.I.G.L. §16-48.1-5.*

63. *See, e.g., R.I.G.L. §16-48.1-8.*

64. *Green v. Mo. Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975).

65. "Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (1982)," No. 915.061, Equal Employment Opportunity Commission, September 7, 1990. Available online at http://www.eeoc.gov/policy/docs/arrest_records.html.

66. *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232 (3d Cir. 2007).

67. *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

35. “EEOC Enforcement Guidance: Pre-Employment Disability Related Questions and Medical Examinations,” No. 915.002, Equal Employment Opportunity Commission, October 10, 1995. Available online at <http://www.eeoc.gov/policy/docs/preemp.html>.
36. See “EEOC Informal Discussion Letter: Pre-Offer Medical Exams,” July 1, 2003. Available online at: http://www.eeoc.gov/eeoc/foia/letters/2003/ada_pre-offer_exams.html.
37. *RI ACLU v. CVS/Pharmacy*, RICHR No. 10 EMD 112-06/05. Among the “attitudinal” statements to which applicants were required to respond, and which were removed: “You change from happy to sad without any reason”; “You get angry more often than nervous”; and “Your moods are steady from day to day.”
38. *O’Connor v. Ortega*, 480 U.S. 709 (1987).
39. *U.S. v. Mancini*, 8 F.3d 104, 108-109 (1st Cir. 1993).
40. See, e.g., *Gossmeyer v. McDonald*, 128 F.3d 481 (7th Cir. 1997).
41. *Leventhal v. Knapek*, 266 F.3rd 64 (2nd Cir. 2001).
42. *Wilson v. Moreau*, 440 F.Supp.2d 81, 104 (D.R.I. 2006).
43. *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010).
44. *Timekeeping Systems, Inc.*, 323 N.L.R.B. No. 30 (1997).
45. *E.I. DuPont de Nemours & Co.*, 311 N.L.R.B. 893 (1993).
46. *Guard Publishing Company v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).
47. *Lee Enters Inc. d/b/a Arizona Daily Star*, NLRB Div. of Advice, No. 28-CA-23267 (4/21/2011).
48. See, e.g., *JT’s Porch Saloon & Eatery Ltd.*, NLRB Div. of Advice, No. 13-CA-46689 (7/7/2011), *Wal-Mart*, NLRB Div. of Advice, No. 17-CA-25030 (7/19/2011).
49. R.I.G.L. §11-35-21; R.I.G.L. §12-5.1-1 *et seq.*
50. R.I.G.L. §11-35-21(c)(1).

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, a locally-based airline pilot 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 court held that federal regulation of the airline industry preempted Rhode Island’s drug testing law.²²

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 erroneously perceived to be an illegal drug user.²³ Thus, an inaccurate drug test could make an employer liable under the ADA. An employer and/or the facility performing the testing could also potentially be liable on grounds of negligence, defamation or similar claims.²⁴

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 pre-employment testing. First, it 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.²⁵ However, an employer need not follow these testing conditions to the extent they are inconsistent with federal law requirements.²⁶

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.²⁷

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 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.

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.²⁹ 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.³⁰

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

A. Yes. The term "lie detector" is broadly defined in the law.³¹ Although polygraph tests are perhaps the most well-known type of "lie detector," there are others. For instance, "psychological stress evaluators" 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.

14. *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), cert. denied, 469 U.S. 979 (1984).

15. R.I.G.L. §28-6.5-1.

16. R.I.G.L. §28-6.5-1(a)(1).

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

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

19. R.I.G.L. §28-6.5-1(b) and (c).

20. 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.

21. P.L. 2011, ch. §221, R.I.G.L. §28-6.5-1(f).

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

23. 42 U.S.C. §12114.

24. *See*, e.g., *Elliott v. Laboratory Specialists, Inc.*, 588 So.2d 175 (La.App. [5th Cir.] 1991), writ denied, 592 So.2d 415 (La.1992). For a contrary ruling, see *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347 (Tex. 1995).

25. R.I.G.L. §28-6.5-2(a).

26. R.I.G.L. §28-6.5-2(c).

27. R.I.G.L. §28-6.5-2(b).

28. R.I.G.L. §28-6.1-1. Though not as encompassing as Rhode Island's ban, a federal law known as the Employee Polygraph Protection Act also restricts polygraph testing in employment. 29 U.S.C. §2001 *et seq.*

29. R.I.G.L. §28-6.1-3.

30. R.I.G.L. §28-6.1-2.

31. R.I.G.L. §28-6.1-4.

32. R.I.G.L. §28-6.1-1.

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

34. 42 U.S.C. §2000e-2(l).

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. Pennsylvania Truck Lines*, 131 F.3d 21 (1st Cir. 1997).
2. Ironically, however, state employees may have less protection than other employees where certain federal *statutes* are involved. That is because, in a series of decisions, the U.S. Supreme Court has held that states have “sovereign immunity” from suit by its employees under some federal laws, such as the Age Discrimination in Employment Act, *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and the Americans with Disabilities Act, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).
3. R.I.G.L. §28-5-7(4)(i) and (iii).
4. One exception to the prohibition is that employers can request that an employee voluntarily provide information for affirmative action purposes so long as the answers are maintained separately from other application materials.
5. 42 U.S.C. §12101.
6. 42 U.S.C. §12112; 29 C.F.R. §1630.13 *et seq.*
7. 42 U.S.C. §12112(d)(4)(A).
8. “EEOC Enforcement Guidance: Workers’ Compensation and the ADA,” Doc. No. 915.002, Equal Employment Opportunity Commission, July 6, 2000. The document can be found online at <http://www.eeoc.gov/policy/docs/workcomp.html>.
9. R.I.G.L. §28-5-7(7).
10. The extent to which a job applicant’s conviction record can be used by an employer is discussed *infra*.
11. R.I.G.L. §28-5-6(2).
12. *United Auto Workers v. Johnson Controls*, 499 U.S. 187 (1991).
13. *NASA v. Nelson*, 131 S.Ct. 746 (2011).

Q. What about written “honesty” tests?

A. Because of the state’s strict ban on polygraph tests, some employers began turning 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.³² 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 Minnesota Multi-Phasic Personality Inventory (MMPI), a popular psychological test administered to police candidates and for 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.³³

In addition, the federal Civil Rights Act of 1991 prohibits adjusting scores or using different cut-off scores in tests on the basis of race, sex, national origin or religion.³⁴ Some psychological tests, such as the MMPI, have had separate scoring systems for males and females, 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 a 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.”³⁵

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.” Many psychological tests would fall into these categories, in whole or in part, and their continued pre-employment use could be open to challenge.

The same would appear to apply to some so-called “personality tests,” which are increasingly being used by employers. The EEOC has noted that a test used to “identify traits such as poor judgment, chronic lateness, poor impulse control, and quick temper are not medical examinations.” But to the extent that such a test seeks to measure, or could be used to determine, whether the individual suffers from, for example, excessive anxiety or depression or has other mental impairments that are listed in the Diagnostic and Statistical Manual of Mental Disorders, it could constitute an illegal medical examination.³⁶

A recent Rhode Island case is instructive in that regard. The R.I. Commission for Human Rights found probable cause to believe that certain “attitude-related” questions being asked in an online job application could have a discriminatory impact on people with certain mental impairments or disorders. As a result, seventeen questions were deleted from the survey under a consent agreement resolving the complaint.³⁷

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

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.¹²⁶

There are also some overlapping federal and state laws that protect employees from retaliation in particular instances, such as for reporting illegal discrimination in the workplace.¹²⁷ Further, if you are a government employee, you may be able to challenge your employer’s action – whether it’s to discharge, discipline, demote or otherwise discriminate against you – as a violation of your constitutional rights.¹²⁸

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.¹²² State employees have similar rights under Department of Administration personnel regulations.¹²³

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.¹²⁴

“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 either their employer or supervisor or to a public body, including a court.¹²⁵ (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

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.” 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.³⁹ In other cases, though, courts have not been as receptive to privacy claims arising from workplace searches.⁴⁰

Q. What about the privacy of information on my office computer?

A. The same rules would generally apply. A private employer will be able to argue that the computer belongs to the employer and is subject to inspection at any time. Depending on the circumstances, a public employee may be able to claim some reasonable expectation of privacy in the contents of his or her computer if, for example, it is located in a private office and the computer is not shared with others. Nonetheless, the employer will likely not violate the Constitution in conducting “reasonable” searches of the computer’s contents, such as when conducting an investigation into allegations of workplace misconduct.⁴¹

In a Rhode Island case, a federal court ruled that a librarian had no reasonable expectation of privacy in stored documents on a computer system that was open for public use, and where stored emails were disseminated or received over a shared network.⁴² In short, employees' rights in this regard will boil down to specific determinations as to the employee's "reasonable expectation of privacy" regarding the computer and the employer's need to access information from it.

Q. Does a public employee have any privacy protection in emails sent from the workplace?

A. This is an evolving area of the law, so there are no clear answers. The U.S. Supreme Court was recently confronted with this question in a case involving a police department's decision to review the text messages of employees who exceeded the monthly limit on their office pagers. Although the court ruled under the unique facts of this case that the review of the messages was legal, the decision rested on very narrow grounds. The court found it unnecessary to resolve the threshold issue of whether the officers had a reasonable expectation of privacy in their text messages. Noting the rapidly changing technology involved, the decision cautioned that courts "must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer."⁴³ For the foreseeable future, then, courts will have to sort out the complex privacy issues raised by employee emails, texting and similar communications.

Q. Do any laws provide protection for the use of email by private sector employees?

A. Generally, no, but the National Labor Relations Board (NLRB) has issued a few opinions which address this issue in the context of labor disputes. In one case, the NLRB held that an employee using the company e-mail system to communicate with coworkers to criticize a personnel policy was protected by federal labor law.⁴⁴ In another ruling, the NLRB held that a policy allowing employees to use e-mail for personal use but not to distribute union literature

Q. Can an employer use my credit history to not hire me?

A. There are no state or federal laws explicitly banning this practice, which has become increasingly common. However, the Equal Employment Opportunity Commission has released a legal advisory letter warning that the use of credit checks to screen job applicants could be unlawful if it leads to the disproportionate exclusion of women, minorities or other groups protected by employment anti-discrimination laws, and is performed in the absence of a business necessity.¹¹⁶ In addition, an employer who denies a person a job as the result of information obtained from a credit reporting agency must advise the applicant of that fact and their legal right to contest the information.¹¹⁷

Q. Can an employer bar me from speaking a language other than English in my personal conversations with other employees?

A. Under federal agency guidelines, English-only rules are allowable only when needed to promote the safe or efficient operation of the employer's business. Thus, according to the EEOC, blanket English-only rules that covered lunch and break times would almost certainly be deemed a violation of anti-discrimination laws. Other policies would also be legally questionable in the absence of a showing of business necessity, according to the EEOC.¹¹⁸ However, courts that have interpreted those same laws have come to differing conclusions about the legality of English-only policies.¹¹⁹ In light of those conflicting court decisions, it is probably safest to say that the answer will depend on all the circumstances.

Q. Are there laws that protect a woman's right to breastfeed at work?

A. Both the R.I. General Assembly and Congress have enacted laws to provide for reasonable unpaid break time to an employee who needs to breastfeed or express breast milk for an infant child (and to be able to do so in private, wherever possible). However, both laws exempt smaller businesses where complying with the law would impose an "undue hardship."¹²⁰

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.¹²¹ Exempted from review

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. A Rhode Island law safeguards 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.¹¹¹ 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 sue for compensatory and punitive damages, attorney's fees and injunctive relief against the employer.¹¹² 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.

Q. Can an employer require me to participate in a health wellness program?

A. No. Participation in such a program, which often requires revealing medical history, must be voluntary. That is, an employer can neither require participation nor penalize employees who do not participate.¹¹³ However, the EEOC has not definitively addressed the question of how far employers can go in offering financial or other incentives to employees to participate in wellness programs without making participation unlawfully coercive.¹¹⁴

Miscellaneous Privacy Issues

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

A. No. 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.¹¹⁵ Injunctive and monetary remedies are available for violations of this law.

violated the law. A federal appeals court ruling supports that principle.⁴⁶

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. But the NLRB has also held that disciplining an employee pursuant to an overbroad rule is not unlawful if the underlying conduct of the employee was not itself protected activity.⁴⁷

Q. What about postings about an employer on private social media sites like Facebook?

A. As a general rule, the issue will come down to whether the comments relate to the types of organizing activity that federal labor laws were designed to protect. For example, in a series of recent opinions, the NLRB has emphasized that employment complaints posted by employees on social media sites that are more in the nature of individual gripes than "concerted activity" are not protected under federal labor law.⁴⁸

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 laws generally restrict the interception of phone communications without consent of one of the parties to the conversation,⁴⁹ 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."⁵⁰ 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 statute⁵¹ – 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.⁵² Special rules may apply for law enforcement employees: a federal appeals court recently ruled that, at least as of

2002 when the taping occurred, public safety employees did not have a clearly established constitutional right to be free from having calls they made at work recorded.⁵³

As with other types of surveillance, special protections apply in the context of collective bargaining activities. Thus, the National Labor Relations Board has held that an employer illegally created an impression of employee surveillance when he displayed at an employee meeting a company telephone bill that highlighted a call that had been made to the state department of labor.⁵⁴

Q. Can an employer engage in video surveillance?

In private employment, probably, but with a few exceptions. First, Rhode Island law bars an employer, in the absence of a court order, from making an audio or video recording of an employee “in a restroom, locker room, or room designated by an employer for employees to change their clothes.”⁵⁵ In addition, use of video cameras in certain other private workplace locations 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.”⁵⁶

Again, special protections come into play where collective bargaining is involved. 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.⁵⁷ And, in a series of decisions, courts have upheld National Labor Relations Board rulings that the installation of surveillance cameras is a mandatory subject for collective bargaining with a union.⁵⁸

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

of your medical records without your consent.¹⁰¹ The statute authorizes persons whose confidentiality has been violated to sue for damages, and successful suits have been brought under the law.¹⁰² Knowing violations of the law also carry potential criminal penalties.¹⁰³ There are a large number of exceptions to the statute, however.¹⁰⁴

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

A. No. Genetic testing can be used to determine a person’s susceptibility to certain diseases. Because testing can divulge private information about a person’s genetic traits and can be utilized for discriminatory purposes, both Rhode Island and federal law have 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.¹⁰⁵ Damages, attorney’s fees and injunctive relief may be obtained in court for any violation of this ban.¹⁰⁶ In 2008, Congress passed a similar federal prohibition, known as the Genetic Information Nondiscrimination Act.¹⁰⁷

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

A. Possibly. The Americans with Disabilities Act regards alcoholism as a protected disease, and further provides protection to recovering drug addicts (but not to people with a current drug problem).¹⁰⁸ 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. What if I use medical marijuana?

A. Rhode Island’s medical marijuana law specifically makes it illegal for an employer to refuse to employ or to “otherwise penalize” a person based solely on his or her status as a medical marijuana card holder.¹⁰⁹ At the same time, an employer has no obligation to accommodate the medical use of marijuana in the workplace, so if private use interfered in any way with the job, the law’s protections would probably not apply.¹¹⁰

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.”⁹⁵ The Act 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 or themselves.

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.⁹⁶ Congress has passed a similar federal law.⁹⁷

Medical Privacy

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

A. No. State law specifically forbids employers from requiring employees or job applicants to be tested for HIV, the virus responsible for AIDS, or from discriminating against an individual based on a positive HIV test “or perception of a positive test.”⁹⁸

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 Americans with Disabilities Act sets very strict limits on the release by employers of information obtained from post-offer and post-hire medical examinations of employees.⁹⁹ Whether such a disclosure also arises to the level of a constitutional violation will often depend on the seriousness of the medical issue at hand.¹⁰⁰

In addition, Rhode Island has a health care confidentiality act which limits the dissemination, by an employer or others,

videotaping were done surreptitiously or where an office’s physical layout or purpose suggested an expectation of privacy, the result might be different.⁵⁹

Q. What about the use of GPS technology to track me at work?

A. The use of Global Positioning System (GPS) technology in the workplace has been growing in both the public and private sector. Presently there are no federal or state laws prohibiting the practice. The few court cases that have been brought to try to limit their use, usually in the context of employers tracking employee work vehicles, have thus far been unsuccessful.⁶⁰

Criminal Record Checks

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

A. Possibly. For certain jobs, state (and sometimes federal) law requires an applicant to undergo a criminal background check. The R.I. Supreme Court has upheld the constitutionality of such requirements.⁶¹ An unanswered question is whether an employer that does not have specific statutory authority to obtain this 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 arrest records, since arrests not followed by convictions may often show up on 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 some occupations, ranging from day care workers to campus security personnel to nurses, Rhode Island law specifically requires applicants to be fingerprinted.⁶² In many instances, however, the law also requires that the police destroy the prints promptly once a criminal record check, based on the fingerprints,⁶³ is completed. Some federally-regulated jobs also have fingerprinting requirements. In the absence of explicit statutory authority, however, an employer should not be able to require fingerprinting for purposes of a criminal record check.

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,⁶⁴ private employers otherwise generally have great discretion in taking employment actions based on past criminal convictions. If you work in the private sector, you may 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, however, it is very possible you have additional protections against being fired.

The EEOC has taken the position that, in light of the disparate impact on racial minorities that the use of prior criminal convictions has, employers must take into account the nature and gravity of the offense, the time that has passed since the conviction and sentence, and the nature of the job sought.⁶⁵ However, in one of the few court cases to analyze the EEOC's guidelines, a federal court rejected them and went on to uphold a bus company policy denying employment to any person with a violent criminal conviction, even though the applicant's conviction in this case had occurred forty years previously.⁶⁶ It thus remains quite unclear how helpful the EEOC's standards are in challenging, on grounds of discrimination, broad employer policies governing criminal records.

If you work for the government, though, 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. At the same time, 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.⁶⁷

private entity employing four or more people, as well as people "acting in the interest of an employer directly or indirectly."⁸⁶ Employment agencies and labor organizations are also prohibited from engaging in discriminatory activities under FEPA.⁸⁷ A person who was discriminated against on the basis of his or her *heterosexuality* is also protected under the law.⁸⁸

It is also illegal for an employer to discriminate against a gay man or lesbian based on outmoded and 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.⁸⁹ Under these circumstances, a gay man or lesbian would also have legal recourse against the employer.

Q. May an employer discriminate against transgendered persons?

A. No. In addition to providing protection on the basis of sexual orientation, state law prohibits discrimination on the basis of gender identity or expression, which is defined to include "a person's actual or perceived gender, as well as a person's gender identity, gender-related self image, gender-related appearance, or gender-related expression."⁹⁰

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

A. There are no laws prohibiting such a requirement for private employees. However, state law explicitly prohibits municipalities from requiring its employees to reside within the city or town as a condition of appointment or continued employment.⁹¹

In addition, if a municipality attempted to require private contractors on city-funded projects to abide by residency requirements, such requirements would likely be found unconstitutional.⁹²

Q. Are state employees required to live in Rhode Island?

A. No. For many years, Rhode Island did have a law requiring most classified state employees to live in Rhode Island, but that law was repealed in 2007.⁹³ Even when the law was on the books, however, its constitutionality was open to serious question.⁹⁴

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.⁸³

Q. May my employer discriminate against me on the basis of my sexual orientation?

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, color, religion, sex, disability, age or country of ancestral origin.⁸⁴

The remedies can include hiring or reinstatement, back pay, compensatory damages and attorney’s fees.⁸⁵ The employers covered by FEPA include all government entities, any

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.⁶⁸

State civil service laws also give classified employees certain guarantees of job security that can be overturned only for good cause.⁶⁹ State personnel regulations provide that only convictions “deemed pertinent to the position” may serve as grounds for refusing to hire an applicant.⁷⁰ This means that the particular circumstances of your case will determine the propriety of a discharge or failure to be hired.

Personal Lifestyle and Off-Duty Activities

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

A. In almost all instances, 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.⁷¹

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.⁷² 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 that required female but not male workers to wear a prescribed uniform which they had to pay to maintain, was found to constitute sex discrimination.⁷³ Other policies that have been held to be impermissible include rules imposing on female, but not male, flight attendants a ban on wearing eyeglasses,⁷⁴ and forcing employees to wear sexually provocative clothing.⁷⁵ 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.⁷⁶

Exceptions may also apply in the situation of dress policies that restrict an employee’s ability to wear garments that are required by his or her religion. Thus, in some recent cases, courts have upheld the right of Muslim women to wear to work a head scarf, or hijab, over employers’ objections.⁷⁷

Finally, although it has not arisen in litigation in Rhode Island to this point, dress codes may be subject to challenge based on a state law prohibiting discrimination on the basis of “gender-related self image” or “gender-related appearance.”⁷⁸

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.⁷⁹ 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. Does this mean I can be fired for wearing tattoos or body piercings?

A. A dress code that bars visible tattoos or body piercings is probably legal, for the same reasons that dress codes generally are upheld, if it is applied equally to all employees. However, it could be illegal as applied to a person who claims such a display is required by a sincerely held religious belief. In those instances, an accommodation of the employee’s beliefs may be required unless the employer can show it would impose an undue hardship or cannot be reasonably accommodated. It is important to note, though, that the federal court of appeals that covers Rhode Island has taken a broader view than some other courts in defining “undue hardship.” It upheld a company’s decision to terminate an employee who wished to display multiple facial piercings as part of her religious beliefs, holding that the adverse effect on the “the employer’s public image” constituted an undue hardship.⁸⁰

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.⁸¹ 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.⁸² Ultimately, the determination of what constitutes illegal discrimination on the basis of physical appearance will be very fact-specific.