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STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2016

A N A C T

RELATING TO LABOR AND LABOR RELATIONS -- WORKERS' COMPENSATION --  
BENEFITS

Introduced By: Senators Lombardo, Conley, and Archambault

Date Introduced: February 25, 2016

Referred To: Senate Labor

It is enacted by the General Assembly as follows:

SECTION 1. Section 28-29-2 of the General Laws in Chapter 28-29 entitled "Workers' Compensation - General Provisions" is hereby amended to read as follows:

**28-29-2. Definitions.** -- In chapters 29 -- 38 of this title, unless the context otherwise requires:

(1) "Department" means the department of labor and training.

(2) "Director" means the director of labor and training or his or her designee unless specifically stated otherwise.

(3) (i) "Earnings capacity" means the weekly straight time earnings which an employee could receive if the employee accepted an ~~actual~~ offer of suitable alternative employment. Earnings capacity can also be established by the court based on evidence of ability to earn, including, but not limited to, a determination of the degree of functional impairment and/or disability, that an employee is capable of employment. The court may, in its discretion, take into consideration the performance of the employee's duty to actively seek employment in scheduling the implementation of the reduction. The employer need not identify particular employment before the court can direct an earnings capacity adjustment. In the event that an employee returns to light duty employment while partially disabled, an earnings capacity shall not be set based upon actual wages earned until the employee has successfully worked at light duty for a period of at least thirteen (13) weeks.

1           (ii) As used under the provisions of this title, "functional impairment" means an  
2 anatomical or functional abnormality existing after the date of maximum medical improvement as  
3 determined by a medically or scientifically demonstrable finding and based upon the Sixth (6th)  
4 edition of the American Medical Association's Guide to the Evaluation of Permanent Impairment  
5 or comparable publications of the American Medical Association.

6           (iii) In the event that an employee returns to employment at an average weekly wage  
7 equal to the employee's pre-injury earnings exclusive of overtime, the employee will be presumed  
8 to have regained his/her earning capacity.

9           (4) "Employee" means any person who has entered into the employment of or works  
10 under contract of service or apprenticeship with any employer, except that in the case of a city or  
11 town other than the city of Providence it shall only mean that class or those classes of employees  
12 as may be designated by a city, town, or regional school district in a manner provided in this  
13 chapter to receive compensation under chapters 29 -- 38 of this title. Any person employed by the  
14 state of Rhode Island, except for sworn employees of the Rhode Island State Police, or by the  
15 Rhode Island Airport Corporation who is otherwise entitled to the benefits of chapter 19 of title  
16 45 shall be subject to the provisions of chapters 29 -- 38 of this title for all case management  
17 procedures and dispute resolution for all benefits. The term "employee" does not include any  
18 individual who is a shareholder or director in a corporation, general or limited partners in a  
19 general partnership, a registered limited liability partnership, a limited partnership, or partners in  
20 a registered limited liability limited partnership, or any individual who is a member in a limited  
21 liability company. These exclusions do not apply to shareholders, directors and members who  
22 have entered into the employment of or who work under a contract of service or apprenticeship  
23 within a corporation or a limited liability company. The term "employee" also does not include a  
24 sole proprietor, independent contractor, or a person whose employment is of a casual nature, and  
25 who is employed other than for the purpose of the employer's trade or business, or a person  
26 whose services are voluntary or who performs charitable acts, nor shall it include the members of  
27 the regularly organized fire and police departments of any town or city except for appeals from an  
28 order of the retirement board filed pursuant to the provisions of Rhode Island general law § 45-  
29 21.2-9; provided, however, that it shall include the members of the police and aircraft rescue and  
30 firefighting (ARFF) units of the Rhode Island Airport Corporation. Whenever a contractor has  
31 contracted with the state, a city, town, or regional school district any person employed by that  
32 contractor in work under contract shall not be deemed an employee of the state, city, town, or  
33 regional school district as the case may be. Any person who on or after January 1, 1999, was an  
34 employee and became a corporate officer shall remain an employee, for purposes of these

1 chapters, unless and until coverage under this act is waived pursuant to subsection 28-29-8(b) or §  
2 28-29-17. Any person who is appointed a corporate officer between January 1, 1999 and  
3 December 31, 2001, and was not previously an employee of the corporation, will not be  
4 considered an employee, for purposes of these chapters, unless that corporate officer has filed a  
5 notice pursuant to subsection 28-29-19(b). In the case of a person whose services are voluntary or  
6 who performs charitable acts, any benefit received, in the form of monetary remuneration or  
7 otherwise, shall be reportable to the appropriate taxation authority but shall not be deemed to be  
8 wages earned under contract of hire for purposes of qualifying for benefits under chapters 29 --  
9 38 of this title. Any reference to an employee who had been injured shall, where the employee is  
10 dead, include a reference to his or her dependents as defined in this section, or to his or her legal  
11 representatives, or, where he or she is a minor or incompetent, to his or her conservator or  
12 guardian. A "seasonal occupation" means those occupations in which work is performed on a  
13 seasonal basis of not more than sixteen (16) weeks.

14 (5) "Employer" includes any person, partnership, corporation, or voluntary association,  
15 and the legal representative of a deceased employer; it includes the state, and the city of  
16 Providence. It also includes each city, town, and regional school district in the state that votes or  
17 accepts the provisions of chapters 29 -- 38 of this title in the manner provided in this chapter or is  
18 a party to an appeal from an order of the retirement board filed pursuant to the provisions of  
19 Rhode Island general law § 45-21.2-9.

20 (6) "General or special employer":

21 (i) "General employer" includes but is not limited to temporary help companies and  
22 employee leasing companies and means a person who for consideration and as the regular course  
23 of its business supplies an employee with or without vehicle to another person.

24 (ii) "Special employer" means a person who contracts for services with a general  
25 employer for the use of an employee, a vehicle, or both.

26 (iii) Whenever there is a general employer and special employer wherein the general  
27 employer supplies to the special employer an employee and the general employer pays or is  
28 obligated to pay the wages or salaries of the supplied employee, then, notwithstanding the fact  
29 that direction and control is in the special employer and not the general employer, the general  
30 employer, if it is subject to the provisions of the Workers' Compensation Act or has accepted that  
31 Act, shall be deemed to be the employer as set forth in subdivision (5) of this section and both the  
32 general and special employer shall be the employer for purposes of §§ 28-29-17 and 28-29-18.

33 (iv) Effective January 1, 2003, whenever a general employer enters into a contract or  
34 arrangement with a special employer to supply an employee or employees for work, the special

1 employer shall require an insurer generated insurance coverage certification, on a form prescribed  
2 by the department, demonstrating Rhode Island workers' compensation and employer's liability  
3 coverage evidencing that the general employer carries workers' compensation insurance with that  
4 insurer with no indebtedness for its employees for the term of the contract or arrangement. In the  
5 event that the special employer fails to obtain and maintain at policy renewal and thereafter this  
6 insurer generated insurance coverage certification demonstrating Rhode Island workers'  
7 compensation and employer's liability coverage from the general employer, the special employer  
8 is deemed to be the employer pursuant to the provisions of this section. Upon the cancellation or  
9 failure to renew, the insurer having written the workers' compensation and employer's liability  
10 policy shall notify the certificate holders and the department of the cancellation or failure to  
11 renew and upon notice, the certificate holders shall be deemed to be the employer for the term of  
12 the contract or arrangement unless or until a new certification is obtained.

13 (7) (i) "Injury" means and refers to personal injury to an employee arising out of and in  
14 the course of his or her employment, connected and referable to the employment.

15 (ii) An injury to an employee while voluntarily participating in a private, group, or  
16 employer-sponsored carpool, vanpool, commuter bus service, or other rideshare program, having  
17 as its sole purpose the mass transportation of employees to and from work shall not be deemed to  
18 have arisen out of and in the course of employment. Nothing in the foregoing provision shall be  
19 held to deny benefits under chapters 29 -- 38 and chapter 47 of this title to employees such as  
20 drivers, mechanics, and others who receive remuneration for their participation in the rideshare  
21 program. Provided, that the foregoing provision shall not bar the right of an employee to recover  
22 against an employer and/or driver for tortious misconduct.

23 (8) "Maximum medical improvement" means a point in time when any medically  
24 determinable physical or mental impairment as a result of injury has become stable and when no  
25 further treatment is reasonably expected to materially improve the condition. Neither the need for  
26 future medical maintenance nor the possibility of improvement or deterioration resulting from the  
27 passage of time and not from the ordinary course of the disabling condition, nor the continuation  
28 of a pre-existing condition precludes a finding of maximum medical improvement. A finding of  
29 maximum medical improvement by the workers' compensation court may be reviewed only  
30 where it is established that an employee's condition has substantially deteriorated or improved.

31 (9) "Physician" means medical doctor, surgeon, dentist, licensed psychologist,  
32 chiropractor, osteopath, podiatrist, or optometrist, as the case may be.

33 (10) "Suitable alternative employment" means employment or an ~~actual~~ offer of  
34 employment which the employee is physically able to perform and will not exacerbate the

1 employee's health condition and which bears a reasonable relationship to the employee's  
2 qualifications, background, education, and training. The employee's age alone shall not be  
3 considered in determining the suitability of the alternative employment. Notwithstanding any  
4 provision to the contrary, an offer of suitable alternative employment may be made at any time  
5 where an employee is claiming entitlement to weekly benefits, regardless of whether liability has  
6 been established. Additionally, notwithstanding any provision to the contrary, an offer of suitable  
7 alternative employment may be made by an employer other than the original employer (in whose  
8 employ the person was injured).

9 (11) "Independent contractor" means a person who has filed a notice of designation as  
10 independent contractor with the director pursuant to § 28-29-17.1 or as otherwise found by the  
11 workers' compensation court.

12 SECTION 2. Section 28-33-18.2 of the General Laws in Chapter 28-33 entitled  
13 "Workers' Compensation - Benefits" is hereby amended to read as follows:

14 **28-33-18.2. Suitable alternative employment.** -- (a) When an employee has sustained  
15 an injury which entitles the employee to receive benefits pursuant to § 28-33-18 or 28-34-3, the  
16 employee may become capable of suitable alternative employment as determined by the workers'  
17 compensation court, or may be offered suitable alternative employment as agreed to by the  
18 employee and employer with written notice to the director. The employer or insurer shall pay an  
19 injured employee that accepts suitable alternative employment a weekly compensation equal to  
20 sixty-six and two-thirds percent (66 2/3%) of the difference between the employee's average  
21 weekly wage, earnings or salary before the injury and his or her weekly wages, earnings or salary  
22 from the suitable alternative employment.

23 (b) The acceptance of suitable alternative employment shall not be mandatory if it results  
24 in the inequitable forfeiture or loss of seniority with the employer or a monetary benefit or other  
25 substantial benefit including, but not limited to, vested pension and/or profit sharing  
26 contributions, arising from the employment relationship.

27 (c) If suitable alternative employment as determined by the workers' compensation court  
28 has been offered to the employee and the employee has refused to accept the employment, then  
29 the workers' compensation court shall, in fixing the amount of compensation payable subsequent  
30 to the refusal, treat earnings capacity as post injury earnings, requiring the employer or insurer to  
31 pay the injured employee a weekly compensation equal to sixty-six and two-thirds percent (66  
32 2/3%) of the difference between the employee's average weekly wage, earnings, or salary before  
33 the injury and the weekly earning capacity. In no case shall increases in payments made to an  
34 injured employee pursuant to § 28-33-18.3(b)(1) or 28-33-17(f) be considered in the calculation

1 of the weekly compensation due pursuant to this section. The fact that the employee is  
2 undergoing rehabilitation does not by itself exempt the employee from the provisions of this  
3 subsection.

4 (d) If the suitable alternative employment is terminated by the employer for reasons  
5 other than misconduct by the employee, the injured employee shall be entitled to be compensated  
6 from the employer in whose employ he or she was injured at the rate to which the employee was  
7 entitled prior to acceptance of the employment after notice by the employee to the employer in  
8 whose employ he or she was injured. The payments shall be made no later than fourteen (14) days  
9 after the notice. If suitable alternative employment is terminated by the employer for misconduct  
10 of the employee, or by the employee, the compensation payable to the employee shall not exceed  
11 that payable during continuance of suitable alternative employment. Upon request to the workers'  
12 compensation court, the employee shall have the right to a determination as to whether or not the  
13 termination was justified. Any employee who accepts suitable alternative employment with his or  
14 her employer of record shall continue to maintain the seniority status and all rights incidental to it  
15 that the employee enjoyed prior to his or her injury, except that these rights shall not exceed the  
16 current rights of a similar employee with equal seniority.

17 (e) Notwithstanding any provision to the contrary, the workers' compensation court shall  
18 have broad discretion to set an earnings capacity in all instances where there is finding that the  
19 employee has the capability to earn, including, but not limited to:

20 (1) Where an appropriate offer of alternative employment has been made, including an  
21 offer by any employer, regardless of whether it was the original employer (in whose employ the  
22 person was injured); or

23 (2) Where it is established, based on a labor market survey or other evidence, that work is  
24 available in the community, whether or not an actual job offer, of any kind, has been made.

25 SECTION 3. This act shall take effect upon passage.

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EXPLANATION  
BY THE LEGISLATIVE COUNCIL  
OF

A N A C T  
RELATING TO LABOR AND LABOR RELATIONS -- WORKERS' COMPENSATION --  
BENEFITS

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1           This act would broaden the definition of "suitable alternative employment." It would also  
2   expand the circumstances under which an earning capacity can be set by the workers'  
3   compensation court.

4           This act would take effect upon passage.

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