

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: March 20, 1998 Revised: \_\_\_\_\_

Subject: Workers' Compensation (Drug-Free Workplace)

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Emrich</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Senate Bill 1972 revises the standard for rebutting a presumption that an employee's injury was caused by intoxication or influence of drugs. It provides that if the employer has implemented a drug-free workplace, the presumption may be rebutted only by evidence that there is no reasonable hypothesis that the intoxication or drug influence contributed to the injury. This revision is in response to the Florida Supreme Court opinion in *Recchi America v. Hall*, 692 So.2d 153 (Fla. 1997) which reviewed the standard for rebutting a presumption as it related to a drug-free workplace and struck down the provision stating that it created an irrebuttable presumption which constituted a violation of an employee's due process.

The workers' compensation drug-free workplace provisions under ch. 440, F.S., were designed to accomplish the twin goals of discouraging drug abuse and maximizing a businesses productivity by eliminating the costs and delays associated with work-related accidents resulting from drug abuse by employees.

The current provisions as to drug-free workplaces state that if an employee is injured and is tested positive for drugs or alcohol, it is *presumed that the injury was occasioned primarily* by the drugs or alcohol, resulting in no workers' compensation benefits being paid. In a work-place which does not have a drug-free policy, that presumption may be rebutted by *clear and convincing evidence* that the drugs or alcohol did *not* contribute to the injury.

This bill amends section 440.09 of the Florida Statutes.

## II. Present Situation:

The Legislature in 1990 enacted provisions establishing the drug-free workplace program within the workers' compensation system as an incentive to employers to implement such programs (ch. 90-201, L.O.F.). Drugs are defined to include alcohol, narcotics and other substance abuse type drugs. It was the clear intent of the Legislature to promote drug-free workplaces in order that employers be afforded the opportunity to maximize their levels of productivity, enhance competitiveness, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug or alcohol abuse by employees. The legislation provides that if drugs or alcohol are found to be present in the employee's system at a certain level, then the employee may forfeit his eligibility for medical and indemnity benefits upon exhaustion of certain proscribed procedures.

The current law (s. 440.09, F.S.) authorizes employers to establish education and testing programs concerning drug abuse for their employees as well as notice provisions specifying that it may be a condition of employment for employees to refrain from taking drugs on or off the job. Furthermore, as to drug-free workplaces, the law establishes the burden of proof regarding employees who test positive for drugs at the time of injury by providing that it *shall be presumed that the (employees) injury was occasioned primarily by the intoxication of, or by the influence of, the drug upon the employee.* The legislation further provides that as to a workplace which did not have a drug-free policy, the presumption may be rebutted by *clear and convincing evidence* that the drugs or alcohol did *not* contribute to the injury.

A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or established in the action. A presumption is not evidence and is either conclusive or rebuttable.

Last year the Florida Supreme Court in *Recchi America v. Hall*, 692 So.2d 153 (Fla. 1997) struck down the provision noted above as to drug-free workplaces by asserting the presumption violated the employee's due process by creating an invalid irrebuttable or conclusive presumption that an employee's injury was occasioned primarily by the employee's drug abuse based on the fact he had tested positive for drugs. The Court adopted the reasoning of the First District Court of Appeal which found in *Recchi* that the employee in the instant case was foreclosed from disproving that drugs caused his injury. In that case, the employee's injury (he was hit on the head by a fellow employee) was totally unrelated to the influence of any drugs he had ingested previously.

## III. Effect of Proposed Changes:

**Section 1.** Amends s. 440.09(7)(a), F.S., by creating a rebuttable presumption in the drug-free workplace that can be overcome if the injured employee presents evidence that there is no reasonable hypothesis that the intoxication or influence of the drug contributed to the injury.

In the absence of a drug-free workplace, the burden of proof standard is not changed and provides that the presumption may be rebutted by *clear and convincing evidence* that the drugs or alcohol did not contribute to the employee's injury.

A presumption is defined as a rule of law, statutory or judicial, by which a finding of a basic fact gives rise to the existence of a presumed fact, until the presumption is rebutted by other evidence.

**Section 2.** Provides that the act shall take effect July 1, 1998, and shall apply to any cause of action or petition for benefits filed on or after that date. This section applies the provisions of the bill to injuries that have occurred before the effective date.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

None.

##### C. Trust Funds Restrictions:

None.

##### D. Other Constitutional Issues:

The Florida Supreme Court in *Recchi America v. Hall*, 692 So.2d 153 (Fla. 1997) struck down a provision in ch. 440, F.S., by finding that the provision violated an employee's right to due process because it created an irrebuttable presumption that the employee's injury in a drug-free workplace was occasioned primarily by the employee's ingestion of drugs based on the fact he had tested positive for drugs. Senate Bill 1972 is in response to the Court's action.

Since the bill addresses a procedural issue regarding burden of proof and not a substantive right, it may be constitutionally applied retrospectively. Thus, the bill applies to all causes of action and petitions for benefits filed on or after the effective date, regardless of the date of injury.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Private employers who have established drug-free workplaces may benefit from the effect of this bill because it establishes a presumption in law which an injured employee will have to overcome to be able to secure benefits in a workers' compensation hearing. The employee will have to present evidence that there was no reasonable hypothesis that the intoxication or drug ingestion contributed to his injury.

Employees who experience workplace injuries and who test positive for drugs or alcohol may be denied workers' compensation benefits if the presumption cannot be overcome.

**C. Government Sector Impact:**

As noted above under Private Sector Impact, public employers who have established drug-free work establishments may also benefit under the same rationale.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.