

**STORAGE NAME:** h4705.fs

**DATE:** April 6, 1998

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
FINANCIAL SERVICES  
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

**BILL #:** HB 4705 (PCB FS 98-08)

**RELATING TO:** Drug-free workplace program requirements

**SPONSOR(S):** Committee on Financial Services and Representative Safley & others

**COMPANION BILL(S):**

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

(1) FINANCIAL SERVICES YEAS 12 NAYS 0

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I. SUMMARY:

For employers implementing a drug-free workplace program, s. 440.09(7)(b), F.S. [formerly s. 440.09(3), F.S. (1991)], creates an irrebuttable presumption that a workplace injury is caused by intoxication or drug use if alcohol or drugs are found in the employee's system at the time of the injury. However, the Florida Supreme Court, in Recchi America, Inc. v. Hall, 692 So.2d 153 (Fla. 1997), declared this irrebuttable presumption to be an unconstitutional violation of due process rights because it does not give the employee the opportunity to prove that intoxication or drug use did not cause the injury. As a result, all employees, regardless of whether a drug-free workplace program is in effect, may presently rebut the presumption that a workplace injury was caused by intoxication or drug use by showing "clear and convincing" evidence that the intoxication or drug use did not cause the injury.

This bill creates an alternative rebuttable presumption for employees of drug-free workplaces. According to the bill, an employee of a drug-free workplace found to have alcohol or drugs in his or her system at the time of an injury, may rebut the presumption by demonstrating that there is no reasonable hypothesis supporting the possibility that the intoxication or drug use contributed to the injury. In creating an alternative presumption, this bill restores the distinction, that existed prior to the Recchi case, between employers who have implemented a drug-free workplace and those who have not.

The bill has no discernible fiscal impact on state or local government.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Florida's worker's compensation law, Chapter 440, Florida Statutes, creates a system in which employers provide disability and medical benefits to employees injured in the course of their employment without regard to fault. In exchange, employees give up the right to sue their employers for damages suffered as a result of those injuries. Pursuant to section 440.38, Florida Statutes, employers secure the payment of compensation to injured employees by either purchasing insurance or meeting specified requirements to self-insure.

**Drug-Free Workplace Program**

In 1990, the Florida Legislature enacted the "drug-free workplace" program as a part of the workers' compensation law. In creating the drug-free workplace program, the Legislature intended "that drug use be discouraged and that employees who choose to engage in drug abuse face the risk of unemployment and the forfeiture of workers' compensation benefits."<sup>1</sup>

In order to establish a drug-free workplace under s. 440.102, F.S., employers must:

- notify employees of employer policies relating to drug use, and
- test applicants and employees for drug use.

As a cost-saving incentive to adopt a drug-free workplace program, employers who meet program requirements receive a 5% discount in their workers' compensation insurance premiums.

**Rebuttable and Irrebuttable Presumptions**

Under present s. 440.09(3), F.S., an employee may not receive worker's compensation benefits if an injury is caused primarily by the intoxication of the employee or by drug use. As enacted in 1990, Florida law creates two separate presumptions regarding workplace injuries and drug or alcohol use:

*Rebuttable Presumption*

- If an employee is found to have alcohol or drugs in his or her system at the time of a workplace injury; and
- the employer *does not* have a drug-free workplace program in effect;
- a rebuttable presumption is created that the intoxication or drug use caused the workplace injury, which can be overcome by showing clear and convincing evidence that the intoxication or drug use did not contribute to the injury.

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<sup>1</sup> Section 440.101(1), F.S.

*Irrebuttable Presumption*

- If an employee is found to have alcohol or drugs in his or her system at the time of a workplace injury; and
- the employer *does* have a drug-free workplace program in effect;
- an irrebuttable presumption is created that the intoxication or drug use caused the workplace injury (i.e., the employee is not given the opportunity to prove that the intoxication or drug use did not cause the injury).

**Standards or Burdens of Proof**

"Standard of proof" or "burden of proof" are phrases used to describe the legal obligation of a party to establish evidence to a required level of belief concerning a disputed issue. There are several different standards of proof:

*Preponderance of the Evidence*

In most civil cases, the burden is on the plaintiff to establish the elements of the case by a "preponderance of the evidence," or as it is sometimes called, the "greater weight of the evidence." This standard is occasionally described as requiring the plaintiff to demonstrate that more than 50% of the evidence supports the case.

*Clear and Convincing Evidence*

Clear and convincing evidence is described as an intermediate standard, more than "preponderance of the evidence," but less than "beyond a reasonable doubt." This standard requires the evidence to be of "such weight that it produces in the mind of the trier of fact a firm belief or conviction." Smith v. Dep't of Health and Rehabilitative Services, 522 So.2d 956, 958 (Fla. 1st DCA 1988).

*Beyond a Reasonable Doubt*

In all criminal cases, the state is required to present evidence which proves the elements of a crime beyond a reasonable doubt. This standard is defined as "entirely convinced" or "satisfied to a moral certainty." Black's Law Dictionary, 5th ed. (1979).

*Reasonable Hypothesis*

In cases involving disputes over property tax assessments, the taxpayer has the burden to demonstrate that the appraisal was not supported by any reasonable hypothesis of legality.<sup>2</sup> In other words, this standard requires that the taxpayer show by proof that every reasonable hypothesis has been excluded which would support the tax assessment.

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<sup>2</sup> See Aetna Life Insurance Company v. Hausman, 598 So.2d 223 (Fla. 5th DCA 1992).

**Hall v. Recchi America, Inc., 671 So.2d 197 (Fla. 1st DCA 1996)**

In Hall v. Recchi America, Inc., 671 So.2d 197 (Fla. 1st DCA 1996), the First District Court of Appeal declared the irrebuttable presumption created in s. 440.09(3), F.S. (1991) (current s. 440.09(7)(b), F.S.), to be unconstitutional. In Recchi, Astley Hall, an employee of a construction company, was injured when a co-worker carrying a long steel screed tripped and hit Hall in the back of the head with the screed. Hall was given a urine test after the accident, which revealed that an illegal amount of marijuana metabolites were present in his system. Testimony revealed that Hall had smoked marijuana five days prior to the accident and that he had smoked marijuana four or five times in the previous fifteen years. Since Hall's employer, Recchi America, Inc., had a drug-free workplace program in effect, it was irrebuttably presumed that the injury to Hall was occasioned by the drug use. Accordingly, the Judge of Compensation Claims denied all worker's compensation benefits. Id. at 200.

On appeal, the First District Court of Appeal characterized the presumption created in s. 440.09(3), F.S. (1991) (current s. 440.09(7)(b), F.S.), as conclusive because the employee is not given a reasonable opportunity to disprove either the predicate fact or the ultimate fact presumed. The court then applied the following three prong test to determine whether the conclusive presumption violates due process:

- (1) whether the concern of the legislature was reasonably aroused by the possibility of an abuse which it legitimately desired to avoid; (2) whether there was a reasonable basis for a conclusion that the statute would protect against its occurrence; and (3) whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption.

Id. (citing Markham v. Fogg, 458 So.2d 1122, 1125 (Fla. 1984); Bass v. General Dev. Corp., 374 So.2d 479, 484 (Fla. 1979)). As to the first and second prongs, the court concluded that the legislature's concern over drug use in the workplace was reasonably aroused and that there was a reasonable basis to conclude that the statute would deter drug use in the workplace. However, the court held that the conclusive presumption failed to satisfy the third prong of the due process test. Regarding the third prong, the court stated:

Because of the high potential for inaccuracy of the conclusive presumption set forth in section 440.09(3), and the feasibility of individualized determinations, fact finding on an individualized basis must be required to afford the employee due process. . . . A positive confirmation of a drug at the time of the industrial injury does not conclusively establish that the industrial accident was causally related to the intoxication of, or the influence of the drug upon, the employee.

Id. at 201.

On review, the Florida Supreme Court affirmed the decision of the First District Court of Appeal and excised the irrebuttable presumption by removing the words, “[i]n the absence of a drug-free workplace program” from s. 440.09(3), F.S. (1991) (current s. 440.09(7)(b), F.S.). Recchi America, Inc. v. Hall, 692 So.2d at 154 (Anstead, J., dissenting with opinion). Consequently, any employee found to have drugs in his or her system at the time of an injury, regardless of whether the employer has implemented a Drug-Free Workplace program, may rebut the presumption created in section 440.09, Florida Statutes, by showing clear and convincing evidence that the intoxication or drug use did not cause the injury.

**B. EFFECT OF PROPOSED CHANGES:**

This bill creates an alternative rebuttable presumption for employees of drug-free workplaces found to have alcohol or drugs in their system at the time of a workplace injury. Under the bill, if a drug-free workplace program is in effect and an employee is found to have alcohol or drugs in his or her system at the time of a workplace injury, a presumption is created that the injury was caused by the intoxication or drug use, which can only be overcome if the employee demonstrates:

that there is no reasonable hypothesis supporting the possibility that the intoxication or drug use contributed to the injury.

In creating this alternative rebuttable presumption, the bill restores the distinction between employers who have implemented drug-free workplaces and those who have not. Prior to the Florida Supreme Court decision in Recchi, employees of drug-free workplaces were not given the opportunity to overcome the presumption that an injury was caused by intoxication or drug use. This bill gives employees of drug-free workplaces the opportunity to overcome the presumption, but it modifies the standard of proof so that it is more stringent than the standard of proof for employees in non-drug-free workplaces.

This bill does not change the current rebuttable presumption for those employers who do not have a drug-free workplace program. For employees of these employers, the rebuttable presumption may still be overcome by showing clear and convincing evidence that the intoxication or drug use did not contribute to the injury.

**C. APPLICATION OF PRINCIPLES:**

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

- (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

- (3) any entitlement to a government service or benefit?

No.

- b. If an agency or program is eliminated or reduced:

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

- (2) what is the cost of such responsibility at the new level/agency?

N/A

- (3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

This bill places a higher burden on employees of Drug-Free Workplaces who are found to have used drugs at the time of an injury, thereby reducing those employees' opportunity to receive worker's compensation benefits.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Employers who adopt Drug-Free Workplace programs are responsible for the expenses associated with implementing program requirements.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Section 440.09(7)(b), Florida Statutes

E. SECTION-BY-SECTION RESEARCH:

N/A

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A



2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None

2. Direct Private Sector Benefits:

Employees of a drug-free workplace found to have used drugs at the time of an injury must meet a higher burden of proof in order to rebut the presumption created in section 440.09, Florida Statutes, and receive worker's compensation benefits. If this burden is more difficult to overcome, employers who adopt drug-free workplace programs are likely to pay fewer worker's compensation claims that involve drug use and spend less money defending these claims. In addition, the higher burden of proof may serve as a deterrent and reduce drug use in the workplace, which would improve workplace safety for all employees.

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

**STORAGE NAME:** h4705.fs

**DATE:** April 6, 1998

**PAGE 10**

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

V. COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON FINANCIAL SERVICES:

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