

STORAGE NAME: h1729z.cf

DATE: May 13, 1999

****FINAL ACTION****

****SEE FINAL ACTION STATUS SECTION****

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CHILDREN & FAMILIES
FINAL ANALYSIS**

BILL #: HB 1729

RELATING TO: Random Drug Testing

SPONSOR(S): Representative Crady

COMPANION BILL(S): SB 1394 (Identical)

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

- (1) CHILDREN & FAMILIES YEAS 7 NAYS 1
- (2) JUDICIARY
- (3) GOVERNMENTAL RULES & REGULATIONS
- (4) HEALTH & HUMAN SERVICES APPROPRIATIONS
- (5)

I. FINAL ACTION STATUS:

04/30/99 H Died in Committee on Judiciary (CJC)

II. SUMMARY:

House Bill 1729 requires that within the Department of Children and Family Services, persons providing care or serving as volunteers to children, persons with developmental disabilities, disabled adults, and elderly persons, for 15 hours or more a week (including those who supervise those persons and volunteers) and all employees of the central abuse hotline be tested for drugs pursuant to the procedures and requirements contained in s. 112.0455, Florida Statutes, the "Drug-Free Workplace Act."

Additionally, the department is authorized to develop a program for random drug testing for these persons. As well, the department is authorized to develop a program for random drug testing for department employees who are certified as fire fighters under ch. 733, F.S., or certified as correctional or law enforcement officers under ch. 943, F.S., positions which are classified as "special risk."

According to the Department of Children and Family Services, an estimated \$319,410 is needed to implement HB 1729 during FY 1999-2000. During FY 2000-01, it would cost the department \$92,610 to comply with the provisions of the bill.

III. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Section 112.0455, F.S., establishes the "Drug-Free Workplace Act" to further three objectives:

- 1) to promote the goal of a drug-free workplace within government through fair and reasonable drug testing methods for the protection of public employees and employers;
- 2) to encourage employers to provide employees who have drug use problems with an opportunity to participate in an employee assistance program or a substance abuse treatment and rehabilitation program; and
- 3) to provide for confidentiality of testing results.

A state agency employer, under the act, has control over the type of drug testing used to screen for drug or alcohol abuse, subject to the availability of laboratories which are authorized to analyze drug specimens and are licensed by the Agency for Health Care Administration.

The "Drug-Free Workplace Act" provides that any state agency may test certain employees and job applicants for use of drugs in accordance with procedures prescribed or authorized by the act. There is no legal duty to test employees or job applicants. Under the act, an employer may conduct drug tests under the following circumstances:

- ▶ Job applicant testing.--An employer may require an employee to submit to reasonable suspicion drug testing. "Reasonable suspicion drug testing" means drug testing based on a belief that an employee is using or has used drugs in violation of the employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience.
- ▶ Reasonable suspicion drug testing shall not be required except upon the recommendation of a supervisor who is at least one level of supervision higher than the immediate supervisor of the employee in question. Among other things, such facts and inferences may be based upon:
 1. Observable phenomena while at work, such as direct observation of drug use or of the physical symptoms or manifestations of being under the influence of a drug.
 2. Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.
 3. A report of drug use, provided by a reliable and credible source, which has been independently corroborated.
 4. Evidence that an individual has tampered with a drug test during employment with the current employer.
 5. Information that an employee has caused, or contributed to, an accident while at work.
 6. Evidence that an employee has used, possessed, sold, solicited, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machines, or equipment.
- ▶ Routine fitness for duty.--An employer may require an employee to submit to a drug test if the test is conducted as part of a routinely scheduled employee fitness-for-duty medical examination that is part of the employer's established policy or that is scheduled routinely for all members of an employment classification or group.
- ▶ Follow up testing.--If the employee in the course of employment enters an employee assistance program for drug-related problems, or an alcohol and drug rehabilitation program, the employer may require said employee to submit to a drug test as a follow up to such program, and on a quarterly, semiannual, or annual basis for up to two years thereafter.

The act requires that: (1) at least 60 days must elapse between a general one-time notice to all employees that a drug-testing program is being implemented and the beginning of actual drug testing; (2) prior to testing, all employees and job applicants must be given a written policy statement including certain information; (3) a notice of drug testing must be included on job vacancy announcements for positions that mandate drug testing; (4) the employer's drug testing policy must be posted in a conspicuous location on the employer's premises; and (5) copies of the employer's drug testing policy must be made available to the general public.

Provisions are also included in the act for: specimen collection and testing, notification of test results, substance abuse treatment options, confirmation testing, employer protection, confidentiality of records, laboratory drug testing standards, adoption of rules, discipline and nondiscipline remedies, federal compliance, and laboratory licensure fees.

Section 39.001(2)(d), F.S., was amended by ch. 98-403, L.O.F., to require that all employees, volunteers, and contracted personnel who perform child protective investigations in the Department of Children and Family Services or all job applicants seeking employment by the department to perform child protective investigations, be drug tested pursuant to the procedures and requirements contained in s. 112.0455, F.S. The Department of Children and Family Services has designated all department employees who perform child protective investigations and who work at the abuse hotline as safety-sensitive positions. In April 1999, as a result of ch. 98-403, L.O.F., the department will begin drug testing 1,350 persons including all child protective investigators and their supervisors and all staff of the abuse hotline.

Section 112.0455(5)(m), F.S., defines a "safety-sensitive position" as any position, including a supervisory or management position, in which a drug impairment would constitute an immediate and direct threat to public health or safety.

The Department of Children and Family Services requires drug testing for all job applicants for special risk positions. "Special risk" is defined in s. 112.0455(5)(n), F.S., as employees who are required as conditions of employment to be certified under ch. 633, F.S., (fire fighters) or ch. 943, F.S., (correctional or law enforcement officers). The department employs certified fire fighters at Florida State Hospital in Chattahoochee, Florida. Forensic institutional officers certified under ch. 943, F.S., are hired at Florida State Hospital's Forensic Unit, North Florida Evaluation and Treatment Center in Gainesville, Florida, and South Florida Evaluation and Treatment Center in Miami, Florida.

LEGAL ISSUES

The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ..." The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the government or those acting at their direction.

Article 1, Section 12 of the Florida Constitution provides similar guarantees against unreasonable searches and seizures. Moreover, the Article states that the right contained therein "shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court."

To be reasonable under the Fourth Amendment, the U.S. Supreme Court has held that a search ordinarily must be based on individualized suspicion of wrongdoing. See Chandler v. Miller, 117 S. Ct. 1295 (1997). But particularized exceptions to the main rule are sometimes warranted based on "special needs, beyond the normal need for law enforcement." Skinner v. Railway Labor Executives Association, 489 U.S. 602, 619 (1989). When such "special needs"--concerns other than crime detection--are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interest advanced by the parties. See National Treasury Employee Union v. Von Raab, 489 U.S. 656, 665-666, (1989). This examination involves the following balancing test: "[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." Von Raab, at 665-666.

The U.S. Supreme Court has applied the preceding balancing test in several key cases. In Skinner, the Court upheld regulations requiring railroads to test employees involved in certain train accidents or violating certain safety rules. The Court found a "compelling" governmental interest in testing the railroad employees without any showing of individualized suspicion, since operation of trains by anyone impaired by drugs "can cause great human loss before any signs of impairment become noticeable." By contrast, the intrusions on privacy were termed "limited" and deemed permissible because of the diminished expectation of privacy in employees having some responsibility for safety in a pervasively regulated industry. In Von Raab, the Court upheld testing applicants for positions with the Custom Service that involved drug interdiction or the carrying of a firearm because of the government's compelling interest in the public safety.

However, in a more recent case, Chandler, the Court invalidated a Georgia statute requiring candidates for state office to pass a drug test. The Court found the state failed to show a special need that was substantial enough to override the individual's acknowledged privacy interest. The Court noted the absence of evidence indicating a drug problem among the state's elected officials who performed tasks not normally considered safety sensitive.

In Florida, the United States District Court from the Middle District in Beattie v. City of St. Petersburg Beach 733 F. Supp. 1455 (M.D. Fla. 1990) held that the city's drug testing program constituted an unreasonable search and violated the Fourth Amendment. The Court found that the drug-testing program for fire fighters which provided for testing without any individualized suspicion of drug use violated the Fourth Amendment, even though the city had a legitimate interest in protecting public safety and welfare by ensuring that fire fighters were fit to perform their duties. The Court noted the absence of any evidence of drug use among the fire fighters either on or off duty or any history of any accidents, fatalities, injuries or property damage that could be attributed to drug use.

B. EFFECT OF PROPOSED CHANGES:

Authorized the Department of Children and Family Services to provide random drug testing for certain employees in accordance with the Drug-Free Workplace Act.

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?

Yes. The department is directed to adopt rules, policies, and procedures for implementing the provisions of this bill.

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

N/A

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

N/A

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?

N/A

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

N/A

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

N/A

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

N/A

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

N/A

3. Personal Responsibility:

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

N/A

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

N/A

4. Individual Freedom:

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

N/A

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

N/A

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 402.355, F.S., is created.

E. SECTION-BY-SECTION ANALYSIS:

Section 1. Creates s. 402.355, F.S.

Requires that all persons who are employees, volunteers, or job applicants of the Department of Children and Family Services whose duties include providing care for 15 hours or more per week, to children, the developmentally disabled, disabled adults, and elderly persons and all persons who supervise these positions be tested for drugs pursuant to the procedures and requirement of s. 112.0455, F.S., the "Drug-Free Workplace Act."

Additionally, the bill specifies that all employees of the central abuse hotline are deemed to be in safety-sensitive positions defined in s. 112.0455, F.S., and must be tested pursuant to s. 112.0455, F.S.

Furthermore, the bill authorizes, but does not require, the department to develop a program for random drug testing for employees, volunteers, or job applicants whose duties include providing care

for children, the disabled, and the elderly, for 15 hours or more per week, notwithstanding the notice, reasonable suspicion, and cause provisions contained in s. 112.0455, F.S. Additionally, employees of the department who require certification under ch. 633, F.S., (fire fighters) and under ch. 943, F.S., (forensic institutional security officers) may be included in the program.

The department is directed to adopt rules, policies, and procedures for implementing the provisions of s. 402.355, F.S.

Section 2. The bill takes effect upon becoming law.

IV. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

According to the Department of Children and Family Services, an estimated \$319,410 is needed to implement HB 1729 during FY 1999-2000. The department estimates that 10,140 persons would be tested for drugs (8,450 current employees, volunteers, and job applicants plus 1,690 persons to allow for a 20 percent turnover rate). A single drug test costs \$31.50. (10,140 x \$31.50 equals \$319,410.)

2. Recurring Effects:

During FY 2000-01, it would cost the department \$92,610 to comply with HB 1729 which includes drug testing 10 percent of all employees and volunteers (9,800 x .10 equals 980) by using a valid method of random sampling and allowing for a turnover rate of 20 percent (2,940 x \$31.50 equals \$92,610).

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:

N/A

2. Direct Private Sector Benefits:

N/A

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

N/A

D. **FISCAL COMMENTS:**

The department's cost estimates for the fiscal impact of the bill does not include the cost of a confirmation test. Section 112.0455, F.S., requires that the employer pay the cost of all drug tests, initial and confirmation, which the employer requires of employees. Subsection (9) requires all positive initial tests to be confirmed using gas chromatography/mass spectrometry (GC/MS) or an equivalent or more accurate scientifically accepted method approved by the Agency for Health Care Administration as such technology becomes available in a cost-effective form. A "Confirmation test," "confirmed test," or "confirmed drug test" means a second analytical procedure used to identify the presence of a specific drug or metabolite in a specimen. The confirmation test must be different in scientific principle from that of the initial test procedure.

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

A. **APPLICABILITY OF THE MANDATES PROVISION:**

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. **REDUCTION OF REVENUE RAISING AUTHORITY:**

The bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

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

The bill does not reduce the percentage of a state tax shared with counties or municipalities.

VI. COMMENTS:

The bill contains a drafting error. There are two subsections labeled (4) in the new statute.

Section 112.0455, F.S., the Drug-Free Workplace Act, includes no provisions or protections related to drug testing volunteers.

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 7, 1999, the committee adopted four amendments to HB 1729.

- ▶ An amendment was adopted to create a subsection 5.
- ▶ An amendment was adopted clarifying that random drug testing of persons who require certification under chapters 633 & 943 is limited to those persons employed by the department.
- ▶ An amendment was adopted that requires the department to immediately terminate any employee who fails one confirmed drug test, notwithstanding any provision of law to the contrary.
- ▶ An amendment was adopted that designates employees performing child protective services as being in safety-sensitive positions.

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VIII. SIGNATURES:

COMMITTEE ON CHILDREN & FAMILIES:

Prepared by:

Staff Director:

Bob Barrios

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FINAL ANALYSIS PREPARED BY THE COMMITTEE ON CHILDREN & FAMILIES:

Prepared by:

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