

STORAGE NAME: h1519a.hcl

DATE: March 23, 2000

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
HEALTH CARE LICENSING & REGULATION
ANALYSIS**

BILL #: HB 1519

RELATING TO: Drug-Free Workplaces

SPONSOR(S): Representative Lynn

TIED BILL(S): None

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

- (1) HEALTH CARE LICENSING & REGULATION YEAS 10 NAYS 3
 - (2) GOVERNMENTAL OPERATIONS
 - (3) INSURANCE
 - (4) HEALTH & HUMAN SERVICES APPROPRIATIONS
 - (5)
-

I. SUMMARY:

The bill transfers the drug-free workplace requirements for public employers from s. 112.0455, F.S., to chapter 442, F.S. It transfers the drug-free workplace requirements for private employers from chapter 440, F.S., to chapter 442, F.S. The bill eliminates duplicate provisions of the two programs and combines them into one comprehensive Florida Government Drug-Free Workplace Act. The Office of Drug Control within the Executive Office of the Governor is designated as the "umbrella agency" for the purpose of coordinating implementation of the program among agencies and departments. This bill revises provisions relating to drug testing, employee or job applicant notification and protection, employer protection, licensure and certification of drug testing laboratories, and standards for drug testing. It provides for rules necessary to implement the act to be adopted by various state agencies.

This bill provides for a workers' compensation rate discount for employers that maintain a drug-free workplace pursuant to ss. 442.02 and 442.03, F.S.

The bill provides an effective date of October 1, 2000.

The bill has an indeterminate fiscal impact on state government. Please see the fiscal comments section for further details.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

The bill grants the Department of Labor and Employment Security and its Division of Workers' Compensation authority to promulgate rules pursuant to this act.

B. PRESENT SITUATION:

Section 112.0455, F.S., is known as the Drug-Free Workplace Act and outlines the standards to which employers must conform when implementing a drug-testing program. This section is applicable to all state government workplaces. Section 440.102, F.S., outlines the standards to which private sector employers must conform when establishing a drug-testing program.

Public Sector

No Legal Duty to Test

Section 112.0455, F.S., creates no legal duty for employers to request an employee or job applicant to undergo drug testing. Drug tests may not be conducted until the employer has identified local drug abuse assistance programs.

Notice to Employees

Employers are required to notify employees and job applicants of the employer's drug testing policy. An employer must give employees a 60-day notice before implementing a drug testing program. All employees or job applicants will be given a written summary of the policy, including the types of testing to which an employee or applicant may be required to submit, the reasons for which a test may be required, the actions that an employer may take against an employee or applicant with a positive test result, a statement regarding confidentiality, and the addresses and phone numbers of local employee assistance programs.

Types of Testing

Public employers are authorized, but not required to conduct the following types of tests:

- Job applicant drug tests -- an employer may require applicants applying for positions that are contingent upon passing a drug test to take and pass a drug test. Refusal to take or receiving a confirmed positive test result are grounds for refusing to hire a job applicant.

- Reasonable-suspicion drug tests -- An employer may require an employee to submit to reasonable-suspicion drug tests.
- Routine fitness-for-duty drug tests -- An employer may require an employee to submit to a drug test if the test is part of a routinely scheduled employee fitness-for-duty medical examination or is part of the employer's established policy or that is scheduled routinely for all members of a certain employment classification.
- Follow-up drug test -- If the employee in the course of employment enters into an employee assistance program for drug-related problems, the employer may require the employee to submit to a drug test, unless the employee voluntarily entered into the program.

Procedures and Employee Protection

The employer must follow specific procedures for the collection and analysis of specimens. Only authorized persons may collect specimens for drug tests. All drug tests must be conducted by a laboratory licensed by the Agency for Health Care Administration (AHCA). An employee must be notified by the employer within five days of a positive confirmed test. The employee then has five days to submit a written explanation contesting the test results. Also, the employee may have a portion of the original specimen reexamined at his own expense by a duly licensed or certified laboratory.

No employer may discharge, discipline, or refuse to hire any employee or applicant on the basis of a positive test result that has not been verified by a confirmation test. The employer may not fire an employee for the first confirmed positive drug test unless that employee refuses to participate in and successfully complete an employee assistance program. An *employee in a safety-sensitive position* may be placed in a non-safety-sensitive position or placed on leave status while participating in an employee assistance program. A *special risk employee* may be discharged or disciplined for the first positive confirmed drug test if the test result confirms illicit drugs pursuant to s. 893.13, F.S.

Confirmation Testing

If an initial drug test is negative, the employer may at its sole discretion, and at the employer's expense, seek a confirmation test. All positive test results must be confirmed using gas chromatography/mass spectrometry or an equivalent or more scientifically accurate test.

Employer Protection

An employer who discharges or disciplines an employee pursuant to this section will be considered to have discharged or disciplined the employee for cause. Employers are allowed to establish reasonable rules regarding employee possession, use, sale, or solicitation of drugs and to take appropriate actions based upon a violation of those rules. Employers are allowed to continue normal medical screening as required by statute, rule, or regulation for the purpose of monitoring exposure of employees to toxic or other unhealthy substances in the workplace.

Confidentiality

All information, reports, and test results produced as a result of this section are confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

Drug Testing Laboratories, Standards

Laboratories conducting drug tests must be licensed by AHCA using criteria established by the United States Department of Health and Human Services. The agency shall require background screening of the managing officer responsible for the daily operation of the laboratory and of the chief financial officer.

Rules

AHCA may promulgate rules concerning standards for drug-testing laboratory licensing, appropriate specimen collection for analysis, methods for analysis to ensure reliable drug testing, minimum cutoff detection levels for drugs, chain-of-custody procedures, retention, storage, and transportation procedures to ensure reliable test results, and a list of the most common medications that may affect or alter a drug test.

The Department of Management Services may adopt rules for all executive branch agencies, the Board of Regents may adopt rules for the State University System, the State Courts Administrator may adopt rules for the state court system, the Justice Administrative Commission may adopt rules on behalf of the state attorneys and public defenders, the Office of Capital Collateral Representative of Florida, and the Judicial Qualifications Commission, and the President of the Senate and the Speaker of the House may adopt rules for employees and members of the Legislature.

Discipline Remedies

An executive branch employee who is disciplined or a job applicant who is not hired pursuant to this section may file an appeal with the Public Employees Relations Commission (PERC) or file a collective bargaining grievance, if available. Relief from PERC may include:

- rescinding the disciplinary action, expunging the related records from the personnel file, and reinstating the employee;
- mandating that the job applicant be given the next available comparable or equivalent job;
- back pay and benefits; and
- reimbursement of necessary costs of the appeal, reasonable attorney's fees, and expert witness fees.

Non-Discipline Remedies

Any person alleging a violation of the provisions of this act that is not remediable by the commission or an arbitrator may institute a civil action for injunctive relief or damages. Relief is limited to an order restraining the continued violation of this section, and reimbursement for the costs of litigation, expert witness fees, reasonable attorney's fees, and noneconomical damages, provided that the damages shall be limited to the recovery of damages directly resulting from injury or loss caused by each violation of this section.

Federal Compliance

Drug testing procedures in this section do not apply where the specific work performed requires employees or job applicants to submit to drug testing under federal regulations.

Fees

Fees from the licensure of drug testing laboratories shall be sufficient to carry out the responsibilities of AHCA. For licensure as a drug testing laboratory the fee shall not be less than \$8,000 per year or more than \$10,000 per year. For late filing, an additional fee of \$500 per day shall be assessed.

Private Sector

No Legal Duty to Test

Private sector employers who maintain a drug free workplace pursuant to s. 440.102, F.S., are eligible to receive the discounts provided under s. 627.0915, F.S., and may deny medical and indemnity benefits to certain employees. The drug-free workplace programs must conform to s. 440.102, F.S. However, private employers have no legal duty to request an employee or job applicant to submit to drug testing.

Notice to Employees

Private employers must provide the same notification to employees or job applicants that public employers provide.

Types of Testing

Private employers wishing to maintain a drug-free workplace must conduct the following types of drug tests:

- Job applicant drug tests -- an employer must require applicants applying for positions that are contingent upon passing a drug test to take and pass a drug test. Refusal to take or receiving a confirmed positive test result are grounds for refusing to hire a job applicant.
- Reasonable-suspicion drug tests -- An employer must require an employee to submit to reasonable-suspicion drug tests.
- Routine fitness-for-duty drug tests -- An employer must require an employee to submit to a drug test if the test is part of a routinely scheduled employee fitness-for-duty medical examination or is part of the employer's established policy or that is scheduled routinely for all members of a certain employment classification.
- Follow-up drug test -- If the employee in the course of employment enters into an employee assistance program for drug-related problems, the employer must require the employee to submit to a drug test, unless the employee voluntarily entered into the program.

Procedures and Employee Protection

The procedures and employee protections are the same for private drug-free workplaces except that an employer may fire, discipline, or refuse to hire an employee or job applicant based upon the first incident of a confirmed positive test result that has been reviewed by the employer's medical review officer. The employer is not required to help the employee obtain rehabilitation through an employee assistance program. If an employee voluntarily seeks treatment while employed and if the employee has never previously tested positive for drug use, then the employer may not discharge, discipline, or fire the employee. The employer may deny certain benefits to an employee who receives a confirmed positive test result that has been reviewed by the employer's medical review officer.

Confirmation Testing

The same standards apply to private employer drug-free workplace programs as apply to public employer programs.

Employer Protection

The standards in this section are identical to those in the public drug-free workplace section except that a private employer is not required to refer an employee with a first-time positive confirmed drug test to an employee assistance program. The employer may immediately discipline or discharge the employee.

Confidentiality

The same standards apply to private employer drug-free workplace programs as apply to public employer programs.

Drug Testing Standards, Laboratories

Laboratories conducting drug tests must be licensed by AHCA or certified by the United States Department of Health and Human Services.

Rules

AHCA may promulgate rules pursuant to s. 112.0455, F.S., concerning standards for drug-testing laboratory licensing, appropriate specimen collection for analysis, methods for analysis to ensure reliable drug testing, minimum cutoff detection levels for drugs, chain-of-custody procedures, and retention, storage, and transportation procedures to ensure reliable test results.

Denial of Benefits

If an employer implements a drug-free workplace program, and follows the procedures in s. 440.102, F.S., any employee that tests positive for drugs may be fired and may be forced to forfeit his or her eligibility for medical and indemnity benefits.

Collective Bargaining Rights

This section does not eliminate the bargainable rights as provided in the collective bargaining process if applicable.

C. EFFECT OF PROPOSED CHANGES:

The bill designates the Office of Drug Control within the Executive Office of the Governor as the “umbrella agency” which will oversee coordination among the state agencies which are responsible for implementing the drug-free workplace provisions of ss. 442.02 and 442.03, F.S.

These new sections are designated as the Florida Government Drug-Free Workplace Act. The bill combines certain provisions that were previously included in s. 112.0455, F.S., with the provisions in ss. 440.101 and 440.102, F.S.

The new Florida Government Drug-Free Workplace Act is intended to regulate all employers, both public and private, that wish to maintain a drug-free workplace. This bill entitles an employer who complies with s. 440.02, F.S., to receive a 10% discount on the rate for his or her workers’ compensation insurance. Also, an employer (public or private) who is in compliance with this section may fire and deny medical benefits and indemnity benefits for any employee who fails a drug test administered pursuant to this act.

The bill retains the standards for notifying employees of a drug testing policy that are currently in s. 440.102, F.S. It requires public employers to conduct drug tests in order to be certified as a drug-free workplace. Postaccident drug tests are added to the list of required tests. Any employee that suffers an accident for which he or she receives medical attention, must be required by the employer to submit to a drug test as a consequence of the accident.

The bill retains the procedures and employee protections previously found in s. 440.102, F.S. Public employers will now abide by these standards. The standards for confirmation testing remain the same as in s. 440.102, F.S., except that an employer may not seek a confirmation test if an original drug test is negative. The bill makes no changes to the employer protection and confidentiality standards listed in s. 440.102, F.S. Public employers must now follow these guidelines.

This bill incorporates the laboratory licensure guidelines from s. 112.0455, F.S., into s. 442.03, F.S. It provides that a laboratory may analyze initial or confirmation drug specimens if it is licensed by AHCA or certified by the United States Department of Health and Human Services.

The bill requires AHCA to adopt rules for laboratories and medical review officers engaged in drug-free workplace testing. The rules will be modeled after the guidelines established by the United States Department of Health and Human Services and the United States Department of Transportation. The rules will include grounds for discipline against a licensed drug-free workplace laboratory including administrative fines and the inspection of all laboratories certified or licensed pursuant to this section. The Department of Labor and Employment Security is authorized to adopt any rules necessary to implement the provisions of this section.

This bill adds the disciplinary and non-disciplinary remedies found in s. 112.0455, F.S., to s. 442.03, F.S. All public employees may appeal through the disciplinary remedies outlined in this section. Either public or private employees may appeal through the non-disciplinary remedies.

HB 1519 creates reporting and accountability standards. The employer or carrier will report to the Division of Workers' Compensation information related to the establishment of a drug-free workplace in accordance with the rules adopted by the division to monitor the effectiveness of drug-free workplaces.

The bill requires employers to educate employees in order to become certified as a drug-free workplace. The Division of Workers' Compensation will adopt rules to specify the educational requirements that must be provided by employers.

This bill provides that any drug testing program must allow for a final review by a medical review officer. A review of all test results will be conducted prior to a report being submitted to an employer.

The bill provides that an employee who works in a drug-free workplace who tests positive for drugs under federal regulations or refuses to submit to such testing shall be disciplined pursuant to s. 442.03, F.S.

The bill requires that the Department of Insurance approve rating plans for workers' compensation that give a 10% discount in the setting of rates to employers that implement a drug-free workplace program, implement a safety program approved by the Division of Safety, or implement both a drug-free workplace program and a safety program approved by the Division of Safety.

This bill also deletes the repeal of all of chapter 442, F.S., and retains the repeal of certain sections of chapter 442, F.S.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 112.0455, F.S., to substantially reword said section, to provide a short title, purposes, and legislative findings.

Section 2. Amends s. 397.332, F.S., to designate the Office of Drug Control within the Executive Office of the Governor as the "umbrella agency to ensure coordination among the agencies or departments which are responsible for implementing the drug-free workplace provisions."

Section 3. Creates s. 442.01, F.S., to provide a short title indicating that ss. 442.02 and 442.03, F.S., may be referred to as the "Florida Government Drug-Free Workplace Act."

Section 4. Transfers ss. 440.101 and 440.102, F.S., to ss. 442.02 and 442.03, F.S., respectively, and renumbers and amends said sections. It creates a new Florida Government Drug-Free Workplace Act that is applicable to both private and public employers. The section provides for eligibility for certain insurance rate discounts under certain circumstances and provides for ineligibility under certain circumstances. It revises provisions relating to drug testing, notice to employees and job applicants, types of testing, procedures and employee protection, confirmation testing, employer protection, and confidentiality. It revises provisions relating to licensure and certification of drug-testing laboratories, drug-testing standards for laboratories, and rules of the Agency for Health Care Administration relating to drug-testing laboratories. This section revises provisions relating to state employees in safety-sensitive positions or special-risk positions, denial of benefits, discipline and non-discipline remedies, and collective bargaining rights. This section requires employers to educate employees regarding drug-free workplace standards and requires a final review of drug test results by a medical review officer.

Section 5. Amends s. 627.0915, F.S., to mandate that the Department of Insurance approve rating plans for workers' compensation insurance that give a 10% discount to employers that implement a drug-free workplace program, implement a safety program approved by the Division of Safety of the Department of Labor and Employment Security, or implement both a drug-free workplace program and an approved safety program.

Section 6. Amends s. 440.09, F.S., to conform cross references to the newly created ss. 442.02 and 442.03, F.S.

Section 7. Amends s. 443.101, F.S., to conform cross references to the newly created ss. 442.02 and 442.03, F.S.

Section 8. Amends s. 443.1715(3), F.S., to conform cross references to the newly created ss. 442.02 and 442.03, F.S.

Section 9. Effective upon becoming a law, amends s. 14, chapter 99-240, L.O.F., to delete the repeal of chapter 442, F.S., to retain the repeal of certain sections of chapter 442, F.S., and to correct an incorrect section reference.

Section 10. Except as provided, provides an effective date of October 1, 2001.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See fiscal comments section.

2. Expenditures:

See fiscal comments section.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Private employers who maintain a drug-free workplace pursuant to ss. 442.02 and 442.03, F.S., will receive a discount on their workers' compensation insurance rates. Also, these employers will experience a reduction in their workers' compensation claims as they will be allowed to deny benefits to any employee who is injured and tests positive for drugs.

Maintaining a drug-free workplace should also benefit employers through increased employee productivity and higher employee morale.

D. FISCAL COMMENTS:

According to the Department of Management Services, this bill will have an indeterminate fiscal impact on state agencies. Presently, in order to be considered a drug-free workplace public employers may conduct, but are not required to conduct drug tests. The bill changes this and provides that public employers must conduct drug tests in order to be considered a drug-free workplace.

It is not clear what impact this will actually have on state agencies. Staff could not obtain any information regarding how many agencies already conduct drug tests, and was unable to obtain any estimates as to how many drug tests the provisions of this bill will require an agency to conduct to be certified as a drug-free workplace.

IV. 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 expend funds or take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This 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:

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

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

The Department of Management Services expressed concerns that this bill may conflict with the 4th and 14th Amendments to the United States Constitution. The bill requires mandatory drug testing of an employee who receives medical treatment due to an on-the-job accident. This type of suspicionless drug testing may violate the provisions of the 4th and 14th Amendments to the United States Constitution which together generally prevent search and seizure absent individualized suspicion.

The bill mandates testing of applicants for safety-sensitive positions, and amends the definition of safety-sensitive positions. The department feels that the bill expands the definition "well beyond that which has been accepted by state and federal courts." The United States Supreme Court has held that where "public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged." Chandler v. Miller, 520 U.S. 305, 117 S.Ct. 1295.

B. RULE-MAKING AUTHORITY:

The bill grants the Agency for Health Care Administration authority to change its rules regarding drug testing laboratories and the procedures governing how drug tests are conducted.

This bill grants the Division of Workers' Compensation authority to adopt rules regarding educational requirements that must be provided by employers as an element of a drug-free workplace.

It grants the Department of Labor and Employment Security authority to adopt rules necessary to implement the provisions of this act.

C. OTHER COMMENTS:

Department of Insurance

The Department of Insurance has concerns with the change that the bill makes to s. 627.0915, F.S. The bill amends this section to grant a 10% discount to employers that maintain a drug-free workplace pursuant to the rules adopted by the Division of Workers' Compensation or implement a safety program approved by the Division of Safety. It is unclear if this discount is intended by the sponsor to only be applicable to employers who maintain a drug-free workplace.

The department also has concerns with the nature of the discount. There is no actuarial basis that indicates that the number of workers' compensation claims will be reduced as a result of increased participation by employers in the drug-free workplace program. If there is no actuarial basis for the discount then it is simply a subsidy paid for by higher rates assessed against those employers who do not comply with the drug-free workplace standards in this bill.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON HEALTH CARE LICENSING & REGULATION:

Prepared by:

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