SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 718

SPONSOR: Commerce and Economic Opportunities Committee and Senator King

SUBJECT: Drug-Free Workplaces

DATE: March 15, 2001 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gillespie	Maclure	CM	Favorable/CS
2.			GO	
3.			AGG	
4.			AP	
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 718 requires construction contractors, electrical contractors, and alarm system contractors, who contract to perform construction work under certain state contracts, to implement a drug-free workplace program. The committee substitute applies to state contracts for educational facilities, public property and publicly owned buildings, and state correctional system facilities.

This committee substitute substantially amends section 440.102, Florida Statutes.

II. Present Situation:

Drug-Free Workplace Programs

Under current law, there are two parallel drug-free workplace programs in this state, one program for state agencies[1] and another program for private employers.[2] The programs are voluntary for both public and private employers. They include similar requirements for notice to employees and job applicants, standards for drug and alcohol testing, protections for employees and employers, and confidentiality. Under both programs, the standards and procedures for conducting drug tests are established in rules adopted by the Agency for Health Care Administration, but these rules are limited to more technical procedures governing specimen collection, collection sites, initial and confirmation drug testing, standards for drug-testing

[1] *See* s. 112.0455, F.S.

[2] *See* s. 440.102, F.S.

laboratories, methods of analysis, and review of test results by medical review officers before transmission to employers.[3]

The drug-free workplace program for private employers[4] is part of the Workers' Compensation Law.[5] To implement a drug-free workplace program under s. 440.102, F.S, an employer must follow certain notice, education, and procedural requirements. As part of these requirements, employers must provide employees with the following information:[6]

- The employer's policy on employee drug use that identifies the employer's prohibition of drug use, the types of tests required, and the actions the employer may take as a result of a positive test result.
- A copy of s. 440.102, F.S.
- The drug testing procedures and the types of drugs for which employees will be tested.
- A statement concerning confidentiality.
- A list of over-the-counter medications that may alter or affect drug test results.
- The consequences and sanctions for refusing to submit to drug testing.
- A list of employee assistance programs in the local area.
- A statement that the employee or job applicant may contest a positive test within five working days after receiving notification of the test result.

Employers that implement a drug-free workplace program in conformity with the standards and procedures in s. 440.102, F.S., may require an employee to submit to a test for the presence of drugs or alcohol, and, if a drug or alcohol is found to be present in the employee's system at prescribed levels, the employee may be terminated.[7] Consequently, the employee also forfeits his or her eligibility for medical and indemnity benefits under the Workers' Compensation Law.[8]

Under the drug-free workplace program, an employer may not discharge, discipline, or discriminate against an employee based upon the employee's voluntarily seeking of treatment for a drug-related problem if the employee has not previously tested positive for drug use, entered an employee assistance program for drug-related problems, or entered a drug rehabilitation program.[9] Unless prohibited by a collective bargaining agreement, the employer may select the

[3] Rules 59A-24.003–59A-24.008, F.A.C.

[4] Both private and public employers that are not state agencies may implement a drug-free workplace program under s. 440.102, F.S. State agencies may implement the program under s. 112.0455, F.S.

[5] Chapter 440, F.S.

[6] Section 440.102(3), F.S.; Florida Division of Workers' Compensation, *An Employer's Guide to a Drug-Free Workplace*, 6-10 (1997).

[7] Section 440.101(2), F.S.

[8] *Id*.; s. 440.102(2), F.S.

[9] Section 440.102(5)(n), F.S.

employee assistance program or drug rehabilitation program if the employer pays for the program.[10]

The employer must also detail in writing the circumstances that formed the basis for reasonable-suspicion drug testing when conducting these drugs tests. A copy of this documentation must be given to the employee upon request, and the original documentation must be kept confidential by the employer.[11]

Workers' Compensation Premium Credit

In 1990, the Legislature mandated that rating plans approved by the Florida Department of Insurance (department) for workers' compensation insurance must "give specific identifiable consideration in the setting of rates to employers that ... implement a drug-free workplace program."[12] In response to the legislation, the department required insurance carriers to provide a 5-percent premium credit for employers implementing the drug-free workplace program.[13] The rating organization that files rating plans for workers' compensation insurance carriers in Florida, the National Council on Compensation Insurance, Inc. (NCCI), filed a rating plan that included the 5-percent premium credit effective January 1, 1992. The department approved NCCI's rating plan, and the premium credit has remained in effect since that date.[14] An employer receives the premium credit after the employer's drug-free workplace program is approved by its workers' compensation insurance carrier.

In 1996, NCCI published a research brief on drug-free workplace programs.[15] The brief provided an initial actuarial analysis of Florida's 5-percent premium credit and reported: "This analysis indicates that employers who qualified for and received the workers[']' compensation insurance premium credit lowered their losses more than companies that did not receive the discount. ... Overall, preliminary indications support the 5 percent premium credit."[16] The brief compared insurance data from 1991 to 1992 and from 1992 to 1993. The data showed that employers receiving the drug-free workplace premium credit reduced their losses about 5.7 to 5.8 percent more than employers who did not receive the premium credit.[17] The study was only an initial actuarial analysis and demonstrated a correlation between an employer's receipt of the premium

[10] *Id*.

[11] Section 440.102(5)(o), F.S.

[12] Section 627.0915, F.S.

[13] Press Release from Florida Dep't of Insurance, *Gallagher Announces Workers' Comp Rate Reduction for Drug Free Workplaces* (Dec. 6, 1991).

[14] National Council on Compensation Insurance, Inc., *Basic Manual for Workers' Compensation and Employers Liability Insurance, Florida*, 30, 2d reprint (Jan. 2001).

[15] Kim Lucky & Ann Bok, *Drug-Free Workplace Programs: A Review of State Efforts*, National Council on Compensation Insurance, Inc. (Dec. 1996).

[16] *Id*. at 6.

[17] *Id*. at 7-9.

credit and a reduction in losses, but did it not make any conclusions about causality. NCCI has not updated the brief.

According to NCCI, the number of Florida employers that receive the 5-percent premium credit has grown considerably since it was first offered in 1992, growing from less than 1 percent of all polices in 1993 to 5.2 percent of polices in 1999. The following table shows the growth in the number of employers receiving the drug-free workplace premium credit:

Drug-Free Workplace Premium Credit in Florida			
Policy Year	**Number of Drug-Free Workplace Policies**	**Total Number of Policies**	**Percentage of Drug-Free Workplace Policies**
1999	9,244	177,629	5.20
1998	6,964	181,096	3.85
1997	6,204	177,657	3.49
1996	6,489	186,353	3.48
1995	3,155	149,213	2.11
1994	1,581	130,539	1.21
1993	1,049	150,409	0.70

Drug Testing

The cost of all drug tests that are required by an employer under the drug-free workplace program must be paid by the employer.[18]

No existing statute prohibits employers from requiring employees to submit to drug testing. Current law specifically allows an employer that has not implemented a drug-free workplace to require an employee to submit to a drug test when the employer has reason to suspect that a workplace injury was occasioned primarily by the intoxication of the employee or by the use of certain drugs.[19] Because s. 440.102(4)(a), F.S., prescribes certain types of drug testing under the drug-free workplace program, that section also provides it "does not preclude a private employer from conducting random testing, or any other lawful testing, of employees for drugs."[20]

Contractors

Parts I and II of ch. 489, F.S., regulate construction contractors, electrical contractors, and alarm system contractors qualified to engage in the business of contracting under a license, certificate, or registration as required by the Florida Department of Business and Professional Regulation or by statutory exemption. State construction contracts may be awarded to these contractors for educational facilities under ch. 235, F.S.; public property and publicly owned buildings under ch. 255, F.S.; and state correctional system facilities under ch. 944, F.S. Performance of the terms and conditions of state contracts is enforced by contract managers designated by each

[18] Section 440.102(5)(m), F.S.

[19] Section 440.09(7)(a), F.S.

[20] Section 440.102(4)(b), F.S.

agency.[21] Under current law, preference in contracting between equal bids is awarded to the contractor that certifies it has implemented a drug-free workplace program.[22]

III. Effect of Proposed Changes:

Drug-Free Workplace Program Required for Certain Contractors

The committee substitute requires construction contractors, electrical contractors, and alarm system contractors who contract to perform construction work under a state contract to implement a drug-free workplace program under s. 440.102, F.S. This requirement applies to state contracts for educational facilities, public property and publicly owned buildings, and state correctional system facilities.

Drug Testing

While the requirements of the drug-free workplace program are explicit when an employer chooses to drug test employees and job applicants, there is question about whether implementation of a drug-free workplace program requires drug testing. Under s. 440.102(4)(a), F.S., "[a]n employer is required to conduct the following types of drug tests": job applicant drug testing, reasonable-suspicion drug testing, routine fitness-for-duty drug testing, and followup drug testing. However, the statute continues by providing that drug testing may be limited if it is based on a reasonable classification basis.[23]

Section 440.102(2), F.S., requires that "[i]n order to qualify as having established a drug-free workplace program which affords an employer the ability to qualify for the discounts provided under s. 627.0915[, F.S.,] and deny medical and indemnity benefits, under [the Workers' Compensation Law] all drug testing conducted by employers shall be in conformity with the standards and procedures established in [s. 440.102, F.S.] and all applicable rules." The statute further provides that, "[i]f an employer fails to maintain a drug-free workplace program in accordance with the standards and procedures established in [s. 440.102, F.S.,] and in applicable rules, the employer shall not be eligible for discounts under s. 627.0915[, F.S].".[24]

These provisions are clear that implementation of the drug-free workplace program is required in order to receive the 5-percent workers' compensation premium credit, but the statute does not clearly articulate whether drug testing is a requisite part of the drug-free workplace program in order to receive the premium credit.

To further complicate this question, s. 440.102(2), F.S., states that "an employer does not have a legal duty under [s. 440.102, F.S.] to request an employee or job applicant to undergo drug testing." The prevailing interpretation in the insurance industry has been that the drug-free

[21] Section 287.057(13), F.S.

[22] Section 287.087, F.S.

[23] Section 440.102(4)(c), F.S.

[24] Section 440.102(2), F.S.

workplace program is optional, but that drug testing is required in order to receive the 5-percent premium credit.[25] However, in 1992, the form used in Florida for employers to apply for the premium credit, NCCI Form 09-1, asked employers to certify that "[d]rug testing has been conducted."[26] This form was revised by 1997 and required employers to certify only that "[p]rocedures for drug testing have been established and/or drug testing has been conducted."[27] While this change in forms is a subtle difference, it evinces the insurance industry is uncertain about whether drug testing is a requisite part of the drug-free workplace program for purposes of the premium credit.

Because the committee substitute requires certain contractors that construct specified public facilities under a state contract to implement a drug-free workplace program, contract managers at affected agencies will be required to include implementation of a drug-free workplace program as a term or condition of all state contracts for construction of educational facilities, public property and publicly owned buildings, and state correctional system facilities. In addition, these contract managers will be responsible for enforcing performance of these terms and conditions.[28]

The Legislature may wish to amend the committee substitute to clarify whether drug testing is a required part of implementing a drug-free workplace program by the construction contractors, electrical contractors, and alarm system contractors to which the committee substitute applies. The Legislature may also wish to address which classifications of employees, if any, are required to be tested.

Effective Date

The committee substitute takes effect October 1, 2001.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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[25] Press Release from Florida Dep't of Insurance, *Gallagher Announces Workers' Comp Rate Reduction for Drug Free Workplaces*, 2 (Dec. 6, 1991) ("These [drug-free workplace program] requirements include drug testing for job applicants and certain employees"); Kim Lucky & Ann Bok, *Drug-Free Workplace Programs: A Review of State Efforts*, National Council on Compensation Insurance, Inc., 3-4 (Dec. 1996) (In Florida, "employers must include drug testing in their [drug-free workplace] program in order to receive the premium discount. An important distinction should be made with regard to this requirement. Drug-free workplace laws do not establish a legal obligation for employers to conduct drug testing, rather they provide a voluntary incentive program: If the employer wants the premium credit, they must test for drugs; however, they do not have a legal duty to do so"); Florida Division of Workers' Compensation, *An Employer's Guide to a Drug-Free Workplace*, 11 (1997) ("An employer is required to conduct ... Drug Tests under the Florida Workers' Compensation Drug-Free Workplace Program").

[26] National Council on Compensation Insurance, Inc, *Form 09-1* (Jan. 1992).

[27] National Council on Compensation Insurance, Inc, *Form 09-1* (Feb. 1997).

[28] Section 287.057(13), F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Construction contractors, electrical contractors, and alarm system contractors working under a state contract for the construction of educational facilities, public property and publicly owned buildings, and state correctional system facilities may experience an increase in administrative costs, including policy determination, notification, education of employees and job applicants, drug testing, and review of test results. These contractors may also experience a 5-percent reduction in workers' compensation insurance premiums if approved by their insurance carriers.

As an example of these related costs, the Executive Office of the Governor (EOG) implements a drug-free workplace program under s. 112.0455, F.S. As part of this program, the Governor's office requires its job applicants for Senior Management Service (SMS) and Selected Exempt Service (SES) positions to submit to drug testing and mandates that, once employed, these employers are subject to reasonable-suspicion drug testing. According to the EOG, between July 1, 1999, and June 30, 2000, the Governor's office tested 46 job applicants at a cost of $27.38 per drug test, plus $6 per test for review by a medical review officer (a total of $33.38 per applicant). No reasonable-suspicion drug tests were performed. The EOG reports the marginal increase in its staff time devoted to implementation of its drug-free workplace program was nominal and was absorbed without a need to increase staff positions. Thus, the total amount expended by the EOG to implement its drug-free workplace program for FY 1999-2000 was $1,535.48.

Drug-testing laboratories may experience an increase in revenue resulting from affected contractors having to test employees and job applicants for drugs and alcohol.

Employees who fail drug or alcohol tests administered under a drug-free workplace program may be discharged from employment and may forfeit medical and indemnity benefits under the Workers' Compensation Law.

C. Government Sector Impact:

If construction contractors, electrical contractors, and alarm system contractors contemplate the costs of implementing a drug-free workplace program as part of their bid proposals for

state contracts for construction of educational facilities, public property and publicly owned buildings, and state correctional system facilities, an indeterminate government sector impact may result for state and local agencies when constructing these facilities. Conversely, competitive bidding for these state contracts may cause the contractors to internally absorb these costs.

VI. Technical Deficiencies:

None.

VII. Related Issues:

According to the federal Occupational Safety and Health Administration (OSHA), from 1996 to 1998, the number of fatalities in the construction industry in this state increased significantly from 50 in 1996 to 65 in 1998, a 30 percent increase. In 1999, OSHA began the Construction Accident Reduction Emphasis (CARE) program. The program seeks to reduce accidents and fatalities in Florida's construction industry by conducting inspections and offering training and education. In 1999, the number of construction fatalities in Florida fell to 54, but that number increased to 59 in 2000.

In its 1999 annual report, the Division of Workers' Compensation within the Department of Labor and Employment Security stated that from 1990 to 1999, all major industries except for mining posted fairly consistent year-to-year declines in injury rates for each of the 10 years.[29] The division noted that the construction industry had the highest injury rates for each of the 10 years, although its 1998 (2.4 percent) and 1999 (1.98 percent) rates were about one-half of those for 1990 (4.66 percent) and 1991 (4.07 percent).[30]

[29] Florida Division of Workers' Compensation, *2000 Statistical Supplement to 1999 Annual Report*, 2 (Mar. 2000).

[30] *Id*.

The following table demonstrates that lost-time injuries have fallen steadily over the last decade and shows the construction industry continues to report the highest rates of lost-time injuries:

Percentage of Lost-Time Injuries by Industry and Injury Year (1990 to 1999)†[31]										
Major Industry Division	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997***	**1998***	**1999***
Agriculture, Forestry & Fishing	2.56	2.33	2.34	2.24	2.13	2.35	2.26	2.03	1.80	1.40
Mining	1.59	1.77	2.33	2.73	1.94	1.62	1.90	2.02	1.97	2.09
Construction	**4.66**	**4.07**	**3.84**	**3.55**	**3.42**	**3.19**	**2.99**	**2.82**	**2.40**	**1.98**
Manufacturing	2.12	1.86	1.72	1.60	1.63	1.56	1.56	1.46	1.25	1.11
Transportation & Public Utilities	2.53	2.32	2.14	2.14	2.11	1.92	1.95	1.74	1.81	1.55
Wholesale Trade	1.52	1.40	1.21	1.09	1.09	1.10	1.03	0.96	0.89	0.73
Retail Trade	1.59	1.52	1.38	1.26	1.22	1.06	0.99	0.96	0.90	0.77
Finance, Insurance & Real Estate	1.22	1.15	1.00	0.81	0.79	0.73	0.67	0.48	0.43	0.33
Services & State/Local Gov't	1.31	1.26	1.22	1.12	1.08	1.04	1.02	1.00	0.87	0.73
Total	**1.79**	**1.64**	**1.60**	**1.51**	**1.42**	**1.33**	**1.29**	**1.25**	**1.11**	**0.97**

† Number of lost-time injuries as a percentage of total employment by major industry division
* Preliminary reporting

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

[31] *Id*. at 8.