

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7137 PCB CRJU 06-06 DOC Random Drug Testing

SPONSOR(S): Criminal Justice Committee

TIED BILLS: IDEN./SIM. BILLS: CS/SB 1736

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Criminal Justice Committee	8 Y, 0 N	Cunningham	Kramer
1) Governmental Operations Committee		Mitchell	Williamson
2) Criminal Justice Appropriations Committee			
3) Justice Council			
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The Department of Corrections is authorized to test its employees for the illegal use of controlled substances, including anabolic steroids, using *random* drug testing. The Department of Corrections is, however, precluded from testing its employees for the illegal use of steroids using *reasonable suspicion* drug testing under the Drug-Free Workplace Act because it does not include anabolic steroids in the definition of "drugs."

This bill authorizes the Department of Corrections to develop a program to test employees in "safety-sensitive" and "high-risk" positions for anabolic steroids using *reasonable suspicion* drug testing. The reasonable suspicion drug testing must be conducted in a manner "consistent with" the Drug-Free Workplace Act, but may also be conducted based on violent acts or violent behavior on or off duty.

This bill grants rulemaking authority to the Department of Corrections. Because this bill does not define safety-sensitive or high-risk positions or the testing procedure, this rulemaking authority is very broad and may raise constitutional issues.

This bill does not appear to have a fiscal impact on state government revenues. The Department of Corrections estimates a "minimal" fiscal impact on state government expenditures. This bill does not appear to have a fiscal impact on local government revenues or expenditures.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government – This bill authorizes the Department of Corrections to conduct reasonable suspicion drug testing of certain employees for the illegal use of steroids. This bill increases the rulemaking authority of the Department of Corrections.

B. EFFECT OF PROPOSED CHANGES:

Drug Free-Workplace Act: Generally

Section 112.0455, Florida Statutes, is the Drug-Free Workplace Act. The Drug-Free Workplace Act authorizes¹ employers to conduct four types of drug tests: job applicant, reasonable suspicion, routine fitness for duty,² and follow-up.³ The Drug-Free Workplace Act sets forth procedures for the collection of all specimens⁴ and standards for laboratories.⁵ The Drug-Free Workplace Act also provides employee protections⁶ and confidentiality.⁷

Drug Free-Workplace Act: Reasonable Suspicion Drug Testing

Under the Drug-Free Workplace Act, *reasonable suspicion* drug testing is based on a belief that an employee is using or has used drugs in violation of the employer's policy and is drawn from specific, objective, and articulable facts and reasonable inferences from those facts in light of experience.⁸ Among the facts and inferences permitted by the Drug-Free Workplace Act:

- 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.
- Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.
- A report of drug use, provided by a reliable and credible source, which has been independently corroborated.
- Evidence that an individual has tampered with a drug test during employment with the current employer.
- Information that an employee has caused, or contributed to, an accident while at work.
- 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, machinery, or equipment.

¹ Fla. Stat. § 112.0455(4) (2005) (employers do not have a legal duty to request that an employee undergo drug testing).

² Fla. Stat. § 112.0455(7)(c) (2005) (testing 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.).

³ Fla. Stat. § 112.0455(7)(d) (2005) (testing which the employer may conduct for up to 2 years after an employee enters an employee assistance program for drug-related problems, or an alcohol and drug rehabilitation program.).

⁴ Fla. Stat. § 112.0455(8) (2005).

⁵ Fla. Stat. § 112.0455(12) (2005).

⁶ Fla. Stat. § 112.0455(8) (2005).

⁷ Fla. Stat. § 112.0455(11) (2005).

⁸ Fla. Stat. § 112.0455(5)(j) (2005) (The DFWA provides that 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.).

Drug Free-Workplace Act: Steroids Not Tested

The drugs and metabolites tested by the Drug-Free Workplace Act do not include steroids.⁹ Thus, state agencies are precluded from testing employees for steroids through *reasonable suspicion* drug testing under the Drug-Free Workplace Act.

Random Drug Testing: Department of Corrections

Section 944.474, Florida Statutes, prohibits employees of the Department of Corrections from testing positive for the illegal use of controlled substances and authorizes the Department of Corrections to develop a program for the *random* drug testing of all employees. Section 944.474, Florida Statutes, does not, however, define controlled substances or random drug testing.

Yet, the Department of Corrections, by rule, defines “random drug testing” as “a drug test conducted based on a computer generated random sampling in positions identified as being subject to random testing, administered for purposes of determining the presence of drugs or their metabolites.”¹⁰ Relying on the definition for “controlled substances” in section 893.02(4), Florida Statutes,¹¹ which includes steroids, the Department of Corrections tests employees for steroids through *random* drug testing.

Effect of the Bill

This bill authorizes the Department of Corrections to conduct *reasonable suspicion* drug testing of employees in safety-sensitive and high-risk positions for anabolic steroids¹². The reasonable suspicion drug testing must be conducted in a manner consistent with the DFWA, but may also be conducted based on violent acts or violent behavior on or off duty.

C. SECTION DIRECTORY:

Section 1: Amends s. 944.474, F.S., to authorize the Department of Corrections to conduct reasonable suspicion drug testing of employees in safety sensitive or high risk positions for steroids.

Section 2: Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to have a fiscal impact on state government revenues.

2. Expenditures:

The Department of Corrections expects the fiscal impact on state government revenues to be “minimal,” with any costs will be absorbed into the existing budget.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

⁹ Fla. Stat. § 121.0455(13) (2005).

¹⁰ Rule 33-208.403, F.A.C.

¹¹ Fla. Stat. § 893.02(4) (2005) (means any substance named or described in Schedules I-V of section 893.03, Florida Statutes).

¹² Fla. Stat. § 893.03(3)(d) (2005) (An anabolic steroid is any drug or hormonal substance, chemically and pharmacologically related to testosterone, other than estrogens, progestins, and corticosteroids, that promotes muscle growth and includes 48 listed substances).

This bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

This bill does not appear to have a fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the municipalities or counties to spend funds or take action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with municipalities or counties.

2. Other:

Fourth Amendment

The primary issues raised by employee drug testing policies revolve around Fourth Amendment rights against unlawful search and seizure. In general, the courts have upheld reasonable suspicion drug testing policies based upon *on-duty* drug use or impairment.¹³ Courts have been divided, however, on the issue of whether *off-duty* drug use or impairment can form a legitimate basis for reasonable suspicion drug testing without falling afoul of the Fourth Amendment. The distinguishing factor seems to be whether the employee is in a safety-sensitive position.

For example, in *Benavidez v. Albuquerque*,¹⁴ the court indicated that "information which would lead a reasonable person to suspect non safety sensitive employees . . . of on-the job drug use, possession, or impairment" would provide a sufficient basis for reasonable suspicion drug testing. Additionally, in *American Federation of Government Employees v. Roberts*,¹⁵ the court found that employees of a correctional institution were primary law enforcement officers and therefore could be subjected to reasonable suspicion drug testing based upon either on or off duty conduct. Moreover, in *American Federation of Government Employees v. Martin*,¹⁶ the court held that reasonable suspicion of safety sensitive employees could be conducted based on off-duty drug use or impairment.

Conversely, in *National Treasury Employees v. Yeutter*,¹⁷ the court held that a reasonable suspicion drug testing program that tested non-safety sensitive employees for off duty drug use was unconstitutional. Similarly, in *Rutherford v. Albuquerque*,¹⁸ the court found drug testing unreasonable, in part, because it screened for off-duty drug use which was wholly unrelated to employer's asserted interest in on the job safety.

¹³ See e.g., *Saavedra v. Albuquerque*, 73 F.3d 1525 (10th Cir. 1996); *Garrison v. Department of Justice*, 72 F.3d 1566 (Fed. Cir. 1995).

¹⁴ 101 F. 3d 620 (10th Cir. 1996)

¹⁵ 9 F.3d at 1468 (9th Cir. 1993)

¹⁶ 969 F. 2d 788, 792-93 (9th Cir. 1992)

¹⁷ 918 F. 2d 968 (D.C. Cir. 1990)

¹⁸ 77 F. 3d 1258, 1263 (10th Cir. 1996)

By limiting reasonable suspicion drug testing to employees in safety-sensitive and high-risk positions, this bill is consistent with the line of authorities which support testing employees in safety-sensitive positions.

Delegation of Legislative Power

The lack of definitions and procedures may constitute an unconstitutional delegation of legislative power because the bill may not provide adequate guidelines for proper implementation.¹⁹

First, the bill does not define what constitutes employment in a “safety-sensitive” or “high-risk” position. The Department of Corrections, however, needs definitions in order to implement this legislation. Without additional guidance, the Department of Corrections could define “high-risk” to have the same definition as “special risk” in section 121.0455(5)(n), Florida Statutes, and then subject all certified corrections officers to reasonable suspicion drug testing.

Second, the bill requires reasonable suspicion drug testing to be conducted in a manner that is consistent with section 112.0455, Florida Statutes. Section 112.0455, Florida Statutes, however, provides very detailed procedures and rights. It is not clear how much of section 112.0455, Florida Statutes, that the Department of Corrections needs to incorporate in its reasonable suspicion drug testing to be “consistent” with this section.

B. RULE-MAKING AUTHORITY:

This bill requires the Department of Corrections to adopt rules. While the authorization language is standard, the amount of discretion vested with the Department of Corrections to provide definitions and a testing procedure may constitute an unconstitutional delegation of legislative power.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issue: Lack of Definitions

The Legislature may wish to define “safety-sensitive”²⁰ and “high-risk” positions to assist the Department of Corrections in implementing this legislation and to resolve any potential issues related to being an unconstitutional delegation of legislative power.

Drafting Issue: Lack of Procedures

It is not clear whether employees who are legally using a controlled substance, such as a prescription drug, will be disciplined should they receive a positive drug test. The Drug-Free Workplace Act, which is normally applicable to *reasonable suspicion* drug testing, addresses this concern by requiring agencies with drug-testing programs to give employees being tested a copy of the agency’s drug-testing policy, which must include procedures for employees to confidentially report the use of prescription or nonprescription medications both before and after being tested.²¹ Additionally, the drug-testing policy must include a statement that an employee who receives a positive confirmed drug test result may contest or explain the result to the employer within five working days after written notification of the positive test result.²² The Legislature may wish to designate which procedures in section 112.0455, Florida Statutes, should be used by the Department of Corrections in implementing reasonable suspicion drug testing.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

¹⁹ See, e.g., *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978).

²⁰ Section 112.0455(5)(m), Florida Statutes, provides such a definition.

²¹ Fla. Stat. § 112.0455 (2005).

²² *Id.*