

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

**SPONSOR(S):** Criminal Justice Committee, Kravitz

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

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Criminal Justice Committee	8 Y, 0 N	Cunningham	Kramer
1) Governmental Operations Committee	6 Y, 0 N, w/CS	Mitchell	Williamson
2) Criminal Justice Appropriations Committee	4 Y, 0 N	Sneed	DeBeaugrine
3) Justice Council	11 Y, 0 N	Cunningham	De La Paz
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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### 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 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 anabolic steroids are not included in the definition of "drugs."

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

This bill requires the Department of Corrections to adopt necessary rules.

The Department of Corrections expects the fiscal impact of implementing this bill to be minimal, and will absorb these costs within its existing budget. This bill does not have a fiscal impact on local government.

## 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 authorizes<sup>1</sup> employers to conduct four types of drug tests: job applicant, reasonable suspicion, routine fitness for duty,<sup>2</sup> and follow-up.<sup>3</sup> The Drug-Free Workplace Act sets forth procedures for the collection of all specimens<sup>4</sup> and standards for laboratories.<sup>5</sup> The Drug-Free Workplace Act also provides employee protections<sup>6</sup> and confidentiality.<sup>7</sup>

##### 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.<sup>8</sup> 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; or

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

<sup>2</sup> 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.).

<sup>3</sup> 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.).

<sup>4</sup> Fla. Stat. § 112.0455(8) (2005).

<sup>5</sup> Fla. Stat. § 112.0455(12) (2005).

<sup>6</sup> Fla. Stat. § 112.0455(8) (2005).

<sup>7</sup> Fla. Stat. § 112.0455(11) (2005).

<sup>8</sup> 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.).

- 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.

#### Drug Free-Workplace Act: Steroids Not Tested

The drugs and metabolites tested by the Drug-Free Workplace Act do not include steroids.<sup>9</sup> 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."<sup>10</sup> Relying on the definition for "controlled substances" in section 893.02(4), Florida Statutes,<sup>11</sup> 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 special risk positions for anabolic steroids<sup>12</sup>. A safety-sensitive position is any position in which drug impairment would constitute an immediate and direct threat to public health or safety.<sup>13</sup> A special risk position is any position which is required to be certified under chapter 633 or chapter 943, Florida Statutes, as a condition of employment.<sup>14</sup> The *reasonable suspicion* drug testing must be conducted in accordance with section 112.0455, Florida Statutes, but may also be conducted based on violent acts or violent behavior committed 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 special 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:

<sup>9</sup> Fla. Stat. § 112.0455(13) (2005).

<sup>10</sup> Rule 33-208.403, F.A.C.

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

<sup>12</sup> 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).

<sup>13</sup> Fla. Stat. § 112.0455(5)(m) (2005).

<sup>14</sup> Fla. Stat. § 112.0455(5)(n) (2005).

None.

2. Expenditures:

The Department of Corrections expects the fiscal impact of implementing this bill to be minimal, and will absorb these costs within its existing budget.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

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.<sup>15</sup> 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*,<sup>16</sup> 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*,<sup>17</sup> 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,

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<sup>15</sup> See e.g., *Saavedra v. Albuquerque*, 73 F.3d 1525 (10<sup>th</sup> Cir. 1996); *Garrison v. Department of Justice*, 72 F.3d 1566 (Fed. Cir. 1995).

<sup>16</sup> 101 F. 3d 620 (10<sup>th</sup> Cir. 1996)

<sup>17</sup> 9 F.3d at 1468 (9<sup>th</sup> Cir. 1993)

in *American Federation of Government Employees v. Martin*,<sup>18</sup> 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*,<sup>19</sup> 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*,<sup>20</sup> 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.

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

**B. RULE-MAKING AUTHORITY:**

This bill requires the Department of Corrections to adopt necessary rules.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

On March 29, 2006, the Governmental Operations Committee adopted a "strike-everything" amendment and reported the bill favorably with a committee substitute:

- Amendment 1 defined safety-sensitive and special risk positions. The amendment also required the *reasonable suspicion* drug testing to be conducted in accordance with the Drug-Free Workplace Act.

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<sup>18</sup> 969 F. 2d 788, 792-93 (9th Cir. 1992)

<sup>19</sup> 918 F. 2d 968 (D.C. Cir. 1990)

<sup>20</sup> 77 F. 3d 1258, 1263 (10th Cir. 1996)