

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: CS/SB 2062

INTRODUCER: Commerce Committee and Senator Bennett

SUBJECT: Drug testing of potential and existing beneficiaries for unemployment compensation

DATE: April 17, 2009 REVISED: 04/21/09 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>O'Callaghan</u>	<u>Cooper</u>	<u>CM</u>	Fav/CS
2.	<u>McKay</u>	<u>Wilson</u>	<u>GO</u>	Favorable
3.	_____	_____	<u>TA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This bill requires the Agency for Workforce Innovation (AWI) to implement a Drug Deterrence Pilot Program for Regional Workforce Board 18.

The 2-year pilot program requires the following:

- AWI must develop a screening mechanism to determine which individuals applying for unemployment compensation benefits are likely to be illicit drug users.
- Individuals determined to be likely illicit drug users must be drug tested.
- Individuals applying for unemployment compensation must be notified of AWI's drug testing policy.
- Individuals who test positive for drugs will be denied benefits for a certain length of time.
- AWI must provide individuals who test positive with information on drug treatment programs.
- Testing procedures must meet certain criteria concerning privacy, specimen collection, preservation of specimens, and storage of specimens.
- There must be an appeals process for those individuals deemed ineligible or disqualified for benefits.

The pilot program requires AWI and the Office of Program Policy Analysis and Government Accountability (OPPAGA) to submit reports to the Governor and the Legislature that must include certain findings and must make a recommendation as to whether the program should be continued.

This bill creates section 443.093 of the Florida Statutes.

II. Present Situation:

Unemployment Compensation Overview

According to the United States Department of Labor (USDOL), the Federal-State Unemployment Insurance Program provides unemployment benefits to eligible workers who are unemployed through no fault of their own (as determined under state law) and who meet the requirements of state law.¹ The program is administered as a partnership between the federal government and the states. The individual states collect UC payroll taxes on a quarterly basis, which are used to pay benefits while the Internal Revenue Service collects an annual federal payroll tax under the Federal Unemployment Tax Act (FUTA), used to provide grants to the states to fund UC administration (the FUTA is codified at 26 U.S.C. 3301-3311).

AWI reports that,

[w]hen a state's UC law conforms to the requirements of the Social Security Act the state is eligible to receive federal administrative grants for the operation of the state program. When state UC law conforms to the requirements of the Federal Unemployment Tax Act businesses in the state receive a credit of 5.4 percent against the federal unemployment tax rate of 6.2 percent. On an annual basis the Secretary of the United States Department of Labor certifies to the conformity of state laws to federal law.²

Federal Certification of State Law³

The Secretary of Labor is responsible for determining if states meet the requirements of provisions of federal law. To accomplish this, the Secretary issues interpretations of federal law. Under s. 3304, FUTA, the Secretary certifies during the preceding year the state has complied with the requirements of federal law. This certification ensures that employers in the state are eligible for the full credit against the federal unemployment tax.

In addition, the Secretary is required by s. 302(a), SSA, to certify as a condition of the state administrative grants, that the state law include provision for such methods of administration to be reasonably calculated to insure *full payment* of unemployment compensation when due.

Section 3304(a)4, FUTA, requires, as a condition for employers to receive credit against the federal tax, that state law provide that “[a]ll money withdrawn from the unemployment fund of

¹ USDOL, *State Unemployment Insurance Benefits*, available at <http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp> (Website last visited March 26, 2009).

² See AWI's Bill Analysis on SB 2062, on file with the Commerce Committee.

³ See page 2 of AWI's Bill Analysis on SB 2062, on file with the Commerce Committee, for the language provided under this subheading.

the state shall be used solely in the payment of unemployment compensation..., and for refunds of sums erroneously paid into such fund.”

Section 3306(h), FUTA, defines compensation as “cash benefits payable to individuals with respect to their unemployment.”

Section 303(a), SSA, provides that the Secretary of Labor shall make no certification for payment of administrative grants to a state unless it is found that the law of the state, includes provision for the “[e]xpenditure of all money withdrawn from an unemployment fund of such state, in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund....”

Drug Testing

Federal law requires drug testing in some specific categories of workplaces because the work performed in these areas pose an especially dangerous risk to the employees, the public, or both. The federal Omnibus Transportation Employee Testing Act of 1991 requires drug and alcohol testing of safety-sensitive transportation employees in aviation, trucking, railroads, mass transit, pipelines and other transportation industries and is regulated by the U.S. Department of Transportation.⁴ Federal law also permits states to drug test individuals applying for government benefits under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, also known as the Welfare Reform Act.

Florida law does not currently require drug testing in government programs as a condition to receiving government benefits. However, Florida does give an incentive to employers throughout the state to encourage a drug-free workplace by giving employers a discount on worker’s compensation premiums if the employer meets certain criteria, including drug testing, in the workplace.⁵ Some cities and counties have implemented policies promoting drug-free workplaces.⁶ For example, the City of Miami requests an affidavit to be signed by any job applicant stating that they have not used tobacco during the year previous to their application and if the applicant cannot sign the affidavit then the city may refuse to hire that person.⁷

Pertaining to unemployment compensation, section 443.101(1)(d), F.S., disqualifies individuals for unemployment compensation benefits for “any week with respect to which the Agency for Workforce Innovation (AWI) finds that his or her unemployment is due to a discharge for misconduct connected with the individual’s work, consisting of drug use, as evidenced by a positive, confirmed drug test.” Also, under s. 443.101(2)(c), F.S., if AWI “finds that an individual was rejected for offered employment as the direct result of a positive, confirmed drug test required as a condition of unemployment, the individual is disqualified for refusing to accept an offer of suitable work.”⁸

⁴ U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, available at <http://www.dot.gov/ost/dapc/>.

⁵ See sections 440.102, F.S., and 627.0915, F.S.

⁶ See John L. Daly, *Substance Abuse Policy Adaptation in Florida Municipal Government*, available at <http://www.allbusiness.com/public-administration/administration-human/385970-1.html>.

⁷ *Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995).

⁸ See section 443.101(2), F.S., requiring individuals to accept suitable work when offered and giving the penalty for refusing suitable work.

III. Effect of Proposed Changes:

Section 1 creates s. 443.093, F.S., to create within the Agency for Workforce Innovation (AWI), the Drug Deterrence Pilot Program. This section requires the AWI to develop a screening mechanism to determine which applicants are likely to be illicit drug users. Those applicants determined to be likely illicit drug users are to be drug tested. If an individual refuses to be tested or fails a drug test, that individual is denied unemployment compensation benefits for up to 52 weeks.⁹

AWI must determine the applicant's eligibility for benefits under existing law, prior to being selected for a drug test. AWI must provide notice to all applicants and existing beneficiaries that they may be drug tested.

This section requires that certain drug-testing procedures be followed, including the following:

- Drug testing samples must be collected with respect to individuals' privacy, while also preventing substitution or contamination of the samples;
- The collection of samples must be documented by labeling containers and individuals being tested must complete forms requiring certain information, including a history of taking certain medications which may alter or affect a test;
- Collection, storage, and transportation of testing samples must be conducted in a manner that prevents contamination or adulteration of the samples; and
- Samples must be preserved for at least 6 months, or if a legal matter is pending that concerns the drug testing sample, then the sample must be preserved until the legal matter is resolved.

Any individual who fails a drug test may elect to perform a second, more accurate, drug test. This section also provides for an appeals process for the denial of benefits and provides for the authentication and the admissibility of drug tests in unemployment compensation hearings.

This bill gives the AWI rulemaking authority to implement the Drug Deterrence Pilot Program and requires the AWI to report to the Governor and the Legislature the following information:

- The number of individuals tested for drugs, the substances tested for, and the results of the testing;
- The number of applicants and the number of existing beneficiaries denied benefits;
- Whether there were any obstacles to implementing the program;
- The number of applicants refusing to be tested;
- The number of weeks and the amount of benefits individuals would have been eligible for had they not failed or refused to take a drug test;
- An estimate of the cost of the program;
- An estimate of any cost-savings to the Unemployment Trust Fund; and
- A recommendation to the Legislature as to whether the program should be maintained.

This section also requires the Office of Program Policy Analysis and Government Accountability to evaluate the program and report its findings to the Governor and the Legislature.

⁹ Actual length of denied benefits will depend, in part, upon rules promulgated by AWI.

Section 2 provides for an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Considering that the drug testing policy in this bill will potentially deny individuals government benefits and limit the eligibility of such benefits, it is possible that federal and state constitutional challenges could be made should the bill become law.

Privacy Rights

The bill may be challenged under the federal constitution's right to privacy, implicitly provided under the Bill of Rights and under the Fourteenth Amendment.¹⁰ The federal right to privacy extends to fundamental interests such as marriage, procreation, contraception, family relationships, and the rearing and educating of children.¹¹ The Supreme Court has held that a right to privacy shall be upheld unless the government's policy meets the strict scrutiny test, meaning that the government's action may only be justified by a compelling state interest which is narrowly tailored to carry out the legitimate state interest at stake.¹²

The bill may elicit a challenge under Florida's constitutional privacy clause pursuant to Article I, Section 23. Florida's constitutional right to privacy provides greater protection than the federal constitution.¹³ The Florida Supreme Court in *City of North Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995), found that if an individual makes a constitutional challenge under the privacy clause, the individual must first establish that he or she has a "legitimate expectation of privacy." If a legitimate expectation of privacy exists then the state must demonstrate not only a compelling interest for intruding on one's privacy, but also that the least intrusive means were used in accomplishing its goal.¹⁴ In *Kurtz*, where the City of North Miami refused to hire Ms. Kurtz because she had admitted to using tobacco in the year prior to her application for employment with the city, the court held

¹⁰ See *Roe v. Wade*, 410 U.S. 113 (1973) and *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹¹ *Carey v. Population Serv. Int'l*, 431 U.S. 678, 685 (1977).

¹² *Roe v. Wade*, 410 U.S. 113 (1973).

¹³ *City of North Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995).

¹⁴ *Id.* at 1028.

that Ms. Kurtz had no legitimate expectation of privacy as to whether she was a tobacco user and the city's policy of not hiring tobacco users was upheld as constitutional.¹⁵

Constitutionality of Drug Testing of Welfare Recipients

In 1996, the Personal Responsibility for Work Opportunity Reconciliation Act of 1996 was signed into federal law. The legislation replaced Aid to Families with Dependent Children with a program called Temporary Assistance to Needy Families (TANF), and authorized, but did not mandate, that states could test TANF recipients for use of controlled substances and sanction those who tested positive. The state of Michigan initiated a pilot program that required random, suspicionless testing of recipients. A complaint was filed alleging that the Michigan program violated the Fourth Amendment to the U.S. Constitution. A U.S. District Court judge entered a preliminary injunction enjoining the state from conducting the drug testing.¹⁶ The court noted that there were no public safety elements to the TANF law, and focused on the lack of individualized suspicion in holding that the program was an unconstitutional infringement of Fourth Amendment rights.¹⁷ After a panel of the Sixth Circuit reversed the district court,¹⁸ the Sixth Circuit heard the case *en banc*, and affirmed the judgment of the district court in an equally divided vote.¹⁹ The state of Michigan did not appeal.

This series of cases is not dispositive of the program proposed in this bill, though it illustrates the arguments that could be made in a challenge. This bill appears drafted to specifically address some of the reasoning of the *Marchwinski* district court, by finding that illegal drug use is a threat to public safety, and requiring AWI to develop a mechanism to assess whether an applicant is likely to be an illicit drug user, and drug testing those individuals assessed to be likely illicit drug users.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The AWI reports that implementing the requirements of this bill may conflict with federal law and may therefore, adversely affect businesses. According to the AWI:

[i]f the bill results in the de-certification of Chapter 443, F.S., by the Secretary of the U.S. Department of Labor, businesses in Florida will lose their 5.4 percent credit against the federal unemployment tax rate of 6.2 percent. Florida employers pay the federal tax annually on approximately \$57.5 billion in wages. If employers were required to pay tax at the rate of

¹⁵ *Id.*

¹⁶ *Marchwinski v. Howard*, 113 F. Supp.2d 1134 (E.D. Mich. 2000).

¹⁷ *Id.* at 1144.

¹⁸ *Marchwinski v. Howard*, 309 F.3d 330 (6th Cir. 2002).

¹⁹ *Marchwinski v. Howard*, 60 Fed.Appx. 601 2003 WL 1870916 (6th Cir. 2003).

6.2 percent rather than 0.8 percent as is currently required, the impact on businesses and their ability to expand economic growth in Florida would be dramatic.²⁰

C. Government Sector Impact:

This bill requires the AWI to implement the Drug Deterrence Pilot Program, which denies unemployment compensation benefits to persons who fail or refuse to take a drug test. Therefore, the bill may reduce the number of unemployment compensation recipients, which would result in cost-savings to the Unemployment Compensation Trust Fund.

According to the AWI, Florida received \$89,998,420 million for UC program administration (Employment Security Administration Trust Fund) during the federal fiscal year that ended September 30, 2008. The AWI has opined in an analysis of this bill, that “[i]f the bill results in Chapter 443, F.S., losing its certification by the Secretary of the U.S. Department of Labor, Florida would need to identify other revenue sources to pay for the cost of providing benefits (administration) to eligible workers.”²¹

Additionally, the AWI points out in its analysis that it would incur additional costs to administer the drug testing program and to develop reporting processes.²²

VI. Technical Deficiencies:

None.

VII. Related Issues:

The AWI received a letter dated February 10, 2009, from the United States Department of Labor (USDOL), which opined that the provisions of this bill would place Florida’s unemployment compensation law outside of the conformity requirements of the federal unemployment compensation law.²³ The AWI believes USDOL has taken this position “because the bill denies all benefit rights to an individual for reasons other than those allowed by federal law....”²⁴ In addition, the AWI reports that “[e]nactment of this proposal would create a potential for Florida employers to lose their 5.4 percent credit against the federal unemployment tax and eliminate administrative grants to Florida for the administration of the UC program.”²⁵

²⁰ See AWI’s Bill Analysis of SB 2062, on file with the Commerce Committee.

²¹ *Id.*

²² *Id.*

²³ USDOL letter is on file with the Commerce Committee.

²⁴ See AWI’s Bill Analysis of SB 2062, on file with the Commerce Committee.

²⁵ *Id.*

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce Committee on April 1, 2009:

This CS is different from the bill in that it requires the AWI to establish a 2 year *pilot program* in Regional Workforce Board 18, in lieu of a state-wide program that would have expired in 2012 without further legislation. In addition, it:

- Deletes the random drug testing requirement and replaces it with a requirement that applicants be tested upon establishing a likelihood of illicit drug use through a survey instrument completed by the applicant when they apply for benefits;
- Deletes the requirement that the AWI report to a local law enforcement agency the identification and test results of any person who tests positive for a drug and who is under community supervision for a drug-related criminal offense; and
- Deletes the requirement that applicants and beneficiaries pay for the required drug test, instead requiring the AWI to pay for the drug tests with agency funds.

- B. **Amendments:**

None.