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:	SB 1358
INTRODUCER:	Senator Hays
SUBJECT:	Drug-Free Workplace Act
DATE:	January 27, 2012 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davlantes	Stovall	HR	**Fav/1 amendment**
2.	Seay	Roberts	GO	**Pre-meeting**
3.			BC	
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 expands the authorization of public employers to drug test employees to allow for random drug testing of all employees every 3 months. The bill also allows state agencies to administer drug tests to all job applicants. The bill revises the definition of "job applicant." The bill provides that an employer must determine whether an employee who tested positive is fit to continue in their current job duties while participating in an employee assistance program. The bill replaces references to "safety-sensitive" positions with "mandatory-testing" positions. The bill allows a public employer to terminate the employment of any employee who receives a first-time positive drug test. The bill deletes provisions relating to public employees' collective bargaining rights for drug testing.

This bill substantially amends sections 112.0455, 440.102 and 944.474 of the Florida Statutes.

II. Present Situation:

Drug-Free Workplace Act

In 1989, the Legislature first enacted the Drug-Free Workplace Act (Act).[1] The Legislature's intent in enacting the Act was to "promote the goal of drug-free workplaces within government through fair and reasonable drug testing methods for the protection of public employees and employers"; "encourage employers to provide employees who have drug use problems an opportunity to participate in an employee assistance program or alcohol and drug rehabilitation program"; and "provide for confidentiality of testing results." The Act sets out the specific guidelines to be followed by state agencies who wish to test employees.

The Act currently provides that no employer may discharge, discipline, or discriminate against an employee on the sole basis of the employee's first positive drug test under certain conditions.[2] The Act does permit state employers to discharge or discipline a "special-risk employee" for the first positive confirmed drug test result.[3] In addition, the Act authorizes, but does not require, employers to "require job applicants to submit a drug test and may use a refusal to submit to a drug test or a positive confirmed drug test as a basis for refusal to hire the job applicant."[4] Section 112.0455, F.S. currently defines job applicants as "a person who has applied for a special risk or safety-sensitive position with an employer and has been offered employment conditioned upon successfully passing a drug test."[5]

The Act also authorizes, but does not require, public employers to drug test:

- An employee whom the employer has reasonable suspicion to believe is using or has used drugs.[6]
- An employee as part of a routinely scheduled 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.
- An employee who in the course of employment enters an employee assistance program for drug-related problems, or an alcohol and drug rehabilitation program, as a follow-up for a specified time frame.[7]

Employers without drug testing programs must give at least 60 days notice to all employees before beginning such a program.[8] Before any testing begins, all employees must be given a written statement which provides:

- The employer's policy on drug abuse;
- Drug testing indications and procedures;

[1] Ch. 89-173, L.O.F.
[2] Section 112.0455(8)(n)1, F.S.
[3] Section 112.0455(8)(n)3, F.S. Special risk employees are defined as one who is required as a condition of employment to be certified under chapter 633, F.S. (Fire Prevention Control) or chapter 943, F.S. (Department of Law Enforcement). Section 112.0455(5)(n), F.S.
[4] Section 112.0455(7)(a), F.S.
[5] Section 112.0455(5)(f), F.S.
[6] Section 112.0455(5)(j), F.S.
[7] Section 112.0455(7), F.S.
[8] Section 112.0455(6), F.S.

- Actions taken against violators of the drug policy;
- A confidentiality statement;
- A list of common medications which may interfere with drug tests;
- A list of local employee assistance and substance abuse rehabilitation programs;
- A statement that the employee has 5 business days after receiving a positive drug test to explain the results to the employer and may contest the test result; and
- A statement regarding any collective bargaining agreement related to drug testing and the right to appeal to the Public Employees Relations Commission.[9]

Workers' Compensation Law

The Workers' Compensation Law, contained in Chapter 440, F.S., provides legislative intent to promote drug-free workplaces and sets out notice and procedural requirements for employee drug testing.[10] The requirements in Ch. 440, F.S. are applicable to both private and public employers. An employer is not required to request an employee or job applicant to undergo drug testing.[11]

If an employer implements drug testing that conforms to the statutory standards and procedures and to applicable rules, such employer is eligible for workers' compensation and employer's liability insurance discounts.[12]

Current law provides that drug-free workplace program requirements are a mandatory topic of negotiations with any certified collective bargaining agent for nonfederal public sector employers that operate under a collective bargaining agreement.[13] If applicable, random drug testing must be specified in a collective bargaining agreement as negotiated by the appropriate certified bargaining agent before such testing is implemented.[14]

Department of Corrections Employee Drug Testing

Current law authorizes the Department of Corrections to randomly drug test all employees.[15]

Executive Order 11-58

Executive Order Number 11-58, signed by the Governor on March 22, 2011, requires pre-employment and random drug testing for state employees.[16]

A representative of public employees sued the Governor, alleging that the drug-testing policies required by the order constitute a suspicionless search without a special need in violation of the

[9] *Id.*
[10] *See* ss. 440.101 and 440.102, F.S.
[11] *See* s. 440.102(2), F.S.
[12] Section 440.102(2), F.S.
[13] Section 440.102(13), F.S.
[14] Section 440.102(7)(g), F.S.
[15] Section 944.474(2), F.S.
[16] Executive Order 11-58, Office of the Governor, *available at* http://www.flgov.com/wp-content/uploads/orders/2011/11-58-testing.pdf (last visited January 30, 2012).

Fourth Amendment of the United States Constitution.[17] Both parties have requested summary judgment and are awaiting a decision by a federal district judge.[18]

III. Effect of Proposed Changes:

Section 1 amends s. 112.0455, F.S., expanding the definition of "job applicant" to include any person who has applied for a position with an employer and has been offered employment contingent to passing a drug test; creating a definition for "random testing"; removing the definition for "safety-sensitive position"; providing that an employer may conduct random testing once every 3 months; deleting a provision prohibiting a public employer from discharging, disciplining, or discriminating against an employee (other than a special-risk employee) on the sole basis of the employee's first positive confirmed drug test under certain conditions.

This section also consolidates the provisions relating to continued employment of employees in special risk or safety-sensitive positions. By removing the current definition for "safety-sensitive position", the bill amends the provisions related to employees in such positions to prescribe duties an employee would be automatically deemed unable to safely and effectively perform while participating in an employee assistance program. Such duties are those that require an employee to:

- Carry a firearm;
- Work closely with an employee who carries a firearm;
- Perform life-threatening procedures;
- Work with heavy or dangerous machinery;
- Work as a safety inspector;
- Work with children;
- Work with detainees in the correctional system;
- Work with confidential information or documents pertaining to criminal investigations;
- Work with controlled substances;
- Hold a position subject to s. 110.1127, F.S.;[19] or
- Hold a position in which a momentary lapse in attention could result in injury or death of another person.

If an employer refers the employee to an employee assistance program, the employee will be placed in a job assignment which the employer has determined can be performed during treatment if the employee cannot safely and effectively perform job duties in their current position. If an alternative job assignment is unavailable, the employee is placed on leave status.

[17] *See* "Complaint," *American Federation of State, County and Municipal Employees Council 79, and Richard Flamm, v. Rick Scott*, Case No. 1:11-cv-21976-UU (S.D. Fla. 2011).
[18] *See* "Plaintiff's Motion for Summary Judgment" and "Defendant's Motion for Summary Judgment and Incorporated Memorandum of Law," *American Federation of State, County and Municipal Employees Council 79, and Richard Flamm, v. Rick Scott*, Case No. 1:11-cv-21976-UU (S.D. Fla. 2011).
[19] Section 110.1127, F.S. requires security background checks for employees in specified positions of special responsibility or sensitive location.

Section 2 amends s. 440.102, F.S., removing the current definition for "safety-sensitive position" and replacing the term with "mandatory-testing position"; defining "mandatory-testing position" to mean "with respect to a public employer, a job assignment that requires the employee to" engage in any of the activities which an employee would be deemed unable to safely and effectively perform while participating in an employee assistance program under the Drug-Free Workplace Act; providing that an employer may receive discounts under s. 627.0915, F.S., if an employer maintains a drug-free workplace program broader in scope than the minimum standards established in this section; deleting provisions relating to nonfederal public employees' collective bargaining rights for drug testing.[20]

Section 3 amends s. 944.474, F.S., authorizing the Department of Corrections (DOC) to develop a drug testing program for all job applicants; removing a reference to "safety-sensitive."

Section 4 provides an effective date of July 1, 2012.

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:

Fourth Amendment

Mandatory drug testing programs have been challenged in courts numerous times. The United States Supreme Court has ruled in four situations that suspicionless drug testing is constitutional and does not violate the Fourth Amendment, which protects an individual's rights against unreasonable search and seizure.[21] These situations include suspicionless drug testing of:

[20] In addition to these statutory requirements for collective bargaining, Art. I, s. 6 of the Florida Constitution provides that "[t]he right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged." The Florida Supreme Court has previously ruled that although mandatory collective bargaining is necessary for random drug testing of police officers absent express legislation, such testing is permissible and a managerial prerogative not requiring negotiations when there is some evidence of drug involvement by specific officers. *See Fraternal Order of Police v. City of Miami*, 609 So.2d 31, 32 (Fla. 1992).

[21] A concurring opinion in *Katz v. United States*, 389 U.S. 347, 36-61 (1967), set out the "reasonable expectation of privacy test" – when a person manifests a subjective expectation of privacy that society accepts as reasonable, that person has a "reasonable expectation of privacy" protected by the Fourth Amendment. Therefore, if there is no reasonable expectation of privacy, no Fourth Amendment violation can occur.

- Students in extracurricular activities;[22]
- Student athletes;[23]
- Certain Customs employees;[24] and
- Railroad employees after major accidents.[25]

In these cases, the court focused on the special need of the government, the unique situation involved (school setting, drug enforcement, and major train accidents), and public safety.

The United States Supreme Court has held one suspicionless drug test unconstitutional. In *Chandler v. Miller*, the state of Georgia required all candidates for designated state offices to certify that they had taken a drug test and that the result was negative in order to run for state office.[26] In ruling the drug testing unconstitutional, the court held that,

> "Where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'…But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search."[27]

Federal district courts in Florida have ruled on the constitutionality of random drug testing of public employees and of blanket drug testing of job applicants with a public employer, holding that:

- A state agency's random drug testing policy was unconstitutional as applied to a strategic planning analyst because the employee did not present a concrete risk of real harm;[28] and
- A city's suspicionless drug testing of all new applicants as a condition of employment was unconstitutional because the city produced no concrete evidence or history of drug use among its employees and failed to specifically identify any governmental interest sufficiently compelling to justify testing all job applicants.[29]

An issue that has not been ruled upon in the context of suspicionless public employee and job applicant drug testing in federal courts with jurisdiction in Florida is that of an employee's or applicant's consent to the drug test. Some appellate courts have considered consent of the employee when holding that a physical search of a public employee or his or her property is not an unconstitutional search.[30] In addition, the Third Circuit has held

[22] *Board of Education of Pottawatomie County v. Earls*, 536 U.S. 822 (U.S. 2002).
[23] *Vernonia School District v. Acton*, 515 U.S. 646 (U.S. 1995).
[24] *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (U.S. 1989).
[25] *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (U.S. 1989).
[26] *Chandler v. Miller*, 520 U.S. 305 (1997).
[27] *Id.* at 323.
[28] *Wenzel v. Bankhead*, 351 F.Supp.2d 1316 (N.D. Fla. 2004).
[29] *Baron v. Hollywood*, 93 F.Supp.2d 1337 (S.D. Fla. 2000).
[30] For example, *see United States v. Sihler*, 562 F.2d 349, 350 (5th Cir. 1977) (holding, in part, that a search of a prison guard did not violate the Fourth Amendment because the guard had "voluntarily accepted and continued an employment which subjected him to search on a routine basis") and *United States v. Esser*, 284 Fed. Appx. 757, 758-759 (11th Cir. 2008) (citing *Sihler* and holding that in light of a post office regulation that purses were subject to inspection, a postal employee consented to the search of her purse "by virtue of her voluntary employment and her decision to bring her purse on postal property").

that a public job applicant's consent to a drug test satisfied the Fourth Amendment's reasonableness requirement.[31] In the same ruling, however, the Third Circuit cited a prior case, saying that it "is the law of [the Third Circuit] that 'silent submission' to a drug test 'on pain of dismissal from employment' does not constitute consent."[32]

Other issues that may be arguable are whether the suspicionless drug testing of public employees or job applicants contravenes reasonable expectations of privacy and whether the government has a special need for such drug testing that outweighs the privacy interests of such employees and applicants.

Contracts Clause

The United States Constitution and the Florida Constitution prohibit the state from passing any law impairing the obligation of contracts.[33] "[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear."[34] If a law does impair contracts, the courts will assess whether the law is deemed reasonable and necessary to serve an important public purpose.[35] The factors that a court will consider when balancing the impairment of contracts with the public purpose include: whether the law was enacted to deal with a broad, generalized economic or social problem; whether the law operates in an area that was already subject to state regulation at the time the parties undertook their contractual obligations, or whether it invades an area never before subject to regulation; and whether the law effects a temporary alteration of the contractual relationships of those within its scope, or whether it works a severe, permanent, and immediate change in those relationships, irrevocably and retroactively.[36] An impairment of contracts issue may arise if a current collective bargaining agreement containing drug testing provisions in conflict with those in this bill exists and a public employer who is a party to such agreement chooses to use the expanded drug testing authorization in this bill.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[31] *Kerns v. Chalfont-New Britain Twp. Joint Sewage Auth.*, 263 F.3d 61, 65-55 (3d Cir. 2001).
[32] *Id.* at 66. The cited case, *Bolden v. SEPTA*, 953 F.2d 807 (3d Cir. 1991), held in part that an employee's silent submission to drug testing required as a prerequisite to his return to work was not a voluntary consent to search (*id.* at 824).
[33] Article I, s. 10, U.S. Const.; Art. I, s. 10, Fla. Const.
[34] *Pomponio v. Claridge of Pompano Condominiums, Inc.*, 378 So.2d 774 (Fla. 1979). *See also General Motors Corp. v. Romein*, 503 U.S. 181 (1992).
[35] *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So.2d 681 (Fla. 1980); *Yellow Cab Co. v. Dade County*, 412 So.2d 395 (Fla. 3rd DCA 1982). *See also Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983) (construing the federal constitutional provision). An important public purpose would be a purpose protecting the public's health, safety, or welfare. *See Khoury v. Carvel Homes South, Inc.*, 403 So.2d 1043 (Fla. 1st DCA 1981).
[36] *Pomponio v. Claridge of Pompano Condominiums, Inc.*, 378 S0.2d 774 (Fla. 1979).

B. Private Sector Impact:

The bill's extension of certain insurance discounts to employers with a broader drug-free workplace program than the minimum standards set out in statute may result in an indeterminate reduction in expenditures of private employers.

C. Government Sector Impact:

State agencies may incur increased costs due to the drug testing of additional job applicants and random testing of employees. However, the bill provides that tests are to be administered at each agency's discretion.

VI. Technical Deficiencies:

The bill's title states that it is an act relating to the Drug-Free Workplace Act. However, both s. 112.0455, F.S. (the Drug-Free Workplace Act) and s. 440.102, F.S. (within the Workers' Compensation Law) are amended in this bill.

The bill's title does not address the revised definition of "job applicant" made in lines 103-104.

The bill's title does not state that participation in an employee assistance program may be at the employee's own expense or at the expense of a health insurance plan (lines 19-20), although such provisions are made in line 364.

Throughout the bill, the term "safety-sensitive" has been deleted and replaced with "mandatory-testing." In line 574, however, "safety-sensitive" has been deleted but has not been replaced with "mandatory-testing."

VII. Related Issues:

Lines 368-372 state that if an employer refers an employee to an employee assistance program, the employer must determine whether the employee is able to safely and effectively perform his or her job duties while in the program. However, the bill makes no reference to when such a determination must be made. Presumably, the decision should be made before the employee begins an employee assistance program, but this provision is introduced in the bill's title (line 23) as occurring anytime before the employee completes the program.

Lines 358-398 provide guidelines for the placement of employees in employee assistance programs and drug and alcohol treatment programs. While current statute provides reference to both employee assistance programs and drug and alcohol treatment programs, the bill's new language in this section only refers to employee assistance programs. Adding references to drug and alcohol treatment programs would help better conform this provision with current statute and provide more options for employees.

VIII. Additional Information:

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

None.

B. Amendments:

Barcode 654020 by Health Regulation – January 25, 2012:
Requires that, relating to random drug testing, the size of any random sample may not exceed 30 percent of the total employee population of any particular agency.