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 Health Regulation Committee

BILL:	SB 1358
INTRODUCER:	Senator Hays
SUBJECT:	Drug-Free Workplace Act
DATE:	January 23, 2012 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davlantes	Stovall	HR	**Pre-meeting**
2.			GO	
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill allows state agencies to administer drug tests to all job applicants and random drug tests to all employees every 3 months. A state agency employee may be disciplined, discharged, or referred to employee assistance or a drug and alcohol rehabilitation program on the sole basis of his or her first positive drug test. If the employee enters an employee assistance program, the employer must determine whether he or she is fit to continue current job duties while participating in the program; if it is determined that the employee is not, he or she must be placed in a more adequate job assignment during the program or placed on leave.

The bill substitutes the term "mandatory-testing position" for "safety-sensitive position" for purposes of the Drug-Free Workplace Program in s. 440.120, F.S.

The bill expands eligibility for employer drug-free workplace program discounts for those programs that are broader in scope than statutory requirements and deletes language regarding collective bargaining requirements relating to drug-free workplace provisions.

This bill amends ss. 112.0455, 440.102, and 944.474, F.S.

II. Present Situation:

Drug-Free Workplace Laws

The Drug-Free Workplace Act, s. 112.0455, F.S., provides guidelines and incentives for agencies within state government to prevent substance abuse among their employees, to encourage employees with drug or alcohol problems to seek rehabilitative treatment, and to maintain the

confidentiality of records relating to employee drug use and treatment. Similar provisions are established in s. 440.102, F.S., for non-state agency employers who are covered by the Workers' Compensation Law. Employers are not required[1] to conduct drug testing on employees or job applicants or to provide support for drug and alcohol rehabilitation, but they will receive up to a 5 percent discount on workers' compensation insurance as well as be allowed to deny medical and indemnity benefits to drug-abusing employees if they meet the provisions for a drug-free workplace.[2]

According to statute, the term "drug" includes alcohol, amphetamines, cannabinoids, cocaine, phencyclidine (PCP), hallucinogens, methaqualone, opiates, barbiturates, benzodiazepines, synthetic narcotics, designer drugs, or metabolites of any of these substances.[3]

Who May Be Tested

Any employer may conduct drug tests on employees as part of routine fitness-for-duty medical examinations, to follow up on former participants in employee drug rehabilitation programs, at random (in the private sector), or if there is reasonable suspicion of drug abuse.[4] Reasonable suspicion means that an employer believes an employee is abusing drugs based on "specific objective and articulable facts and reasonable inferences," such as direct observation of drug use at work, observation that the employee behaves as if under the influence of a drug, report of drug use from a reliable source which has been independently corroborated, or evidence that an employee has tampered with a drug test. For state agencies, reasonable suspicion drug testing must be authorized by a supervisor who is at least one level of supervision higher than the immediate supervisor of the employee in question.[5]

Public employers[6] are also permitted to randomly test employees who hold special-risk or safety-sensitive positions.[7] A special-risk position requires an employee to be certified under ch. 633, F.S., relating to firefighters and fire marshals, or ch. 953, F.S., relating to law enforcement officers. A safety-sensitive position is one in which drug impairment constitutes a threat to public health or safety, such as a position that requires the use of a firearm; that entails special responsibility or work in a sensitive location, such as a position with the central abuse hotline, the Division of Treasury, or the developmentally disabled; or in which a momentary lapse in attention could result in injury or death to another person.[8] If applicable, such random testing must be specified in a collective bargaining agreement before it may be implemented.[9]

[1] Construction, electrical, or alarm system contractors regulated under ch. 489, F.S., are required to follow drug-free workplace laws if they are working on state educational facilities, public property, or state correctional facilities. Drug-free workplace program requirements are also a mandatory topic of negotiations in any collective bargaining agreement for nonfederal public sector employees. See: ss. 440.102(13) and (15), F.S.
[2] Sections 112.0455(1)-(4) and 440.102(2), F.S., and Rule 69L-5.220, F.A.C.
[3] Section 112.0455(5), F.S. Identical provisions are found in s. 440.102(1)(c), F.S.
[4] Sections 112.0455(7) and 440.102(4), F.S.
[5] Sections 112.0455(5)(j) and 440.102(1)(n), F.S.
[6] Per s. 440.102(1), F.S., a public employer is any agency within state, county, or municipal government that employs individuals for a salary, wages, or other remuneration.
[7] Section 440.102(7), F.S.
[8] Sections 440.102(1) and 110.1127, F.S.
[9] Section 440.102(7), F.S.

Employers without drug-testing programs must give at least 60 days notice to all employees before beginning such a program. All employees must also be given a written statement which provides:

- The employer's policy on drug abuse,
- Drug testing indications and procedures,
- 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 of any collective bargaining agreement related to drug testing.

Job applicants may also be required to submit to drug testing, although public employers may only test individuals applying for special-risk or safety-sensitive positions.[10] Any applicant to be tested must receive a similar statement to the one listed above, and the requirement for drug testing must be noticed on vacancy announcements.[11] Employers must cover the costs of any drug testing they require.[12]

Employers reserve the right to discipline or discharge any employee or refuse to hire any job applicant who does not submit to a drug test.[13] Employees who test positive or refuse to be tested may also forfeit eligibility for medical and indemnity benefits.[14]

Drug Testing Procedures

Drug tests must be conducted at laboratories licensed by the Agency for Health Care Administration (the agency) and meet certain personnel and quality control standards which are specified in statute and rule.[15] Samples for drug testing must be collected by qualified personnel according to specific protocols to maximize security and privacy.[16] Chain of custody procedures must also be followed to maintain control over all samples from initial collection to final disposition and to provide accountability at each stage in handling, testing, storing specimens, and reporting of test results.[17]

Employers who conduct drug testing must have a medical review officer (MRO) who evaluates the results of employee drug tests in light of pertinent medical history, ensures that chain of custody procedures were adequately followed, and verifies and makes the final determination of employee test results. An MRO must be a licensed physician who has been certified by the

[10] Sections 112.0455(5) and 440.102(1) and (2), F.S.
[11] Sections 112.0455(6) and 440.102(3), F.S.
[12] Sections 112.0455(8)(r) and 440.102(5)(m), F.S.
[13] Sections 112.0455(10)(f) and (g) and 440.102(7)(f), F.S.
[14] Section 440.101(2), F.S.
[15] Sections 112.0455(12) and 440.102(9), F.S., and Rule 59A-24.006, F.A.C.
[16] Sections 112.0455(8) and (13) and 440.102(5) and (10), F.S., and Rule 59A-24.005, F.A.C.
[17] Section 112.0455(5)(e) and 440.102(1)(a), F.S., and Ruel 59A-24.005, F.A.C.

American Association of Medical Review Officers, the American Society of Addiction Medicine, or the Medical Review Officer Certification Council.[18]

All samples are first evaluated using an immunoassay, which returns a result as positive or negative for a specific panel of drugs. Those samples which test positive are then confirmed using a second, more accurate analysis. Cutoff points for the drug concentrations at which hair, urine, or blood samples are declared positive or negative are defined in statute and rule.[19] Test results must be transmitted to the employer within 7 business days.

If a drug test is positive, the MRO must contact the relevant employee within 3 business days to discuss possible reasons for this positive result and to outline procedures for optional retest of the sample. If the employee admits to drug use, a verified positive test report will be sent to the employer.[20] If the employee wishes to contest the test result, the original sample may be retested at his or her expense, at a different laboratory of his or her choosing. The second laboratory must test the sample at equal or greater sensitivity for the drug in question as the original laboratory. The laboratory which performed the first round of testing is responsible for ensuring that chain of custody procedures are followed during transport of the sample.[21]

Consequences of a Positive Drug Test

Within 5 days of receiving notice of an employee's or job applicant's positive drug test, the employer must inform the person of the results of the test, the consequences, and available options for further proceedings. The employee or applicant may contest the results or describe why the results do not constitute a violation of the employer's policy, and the employer may accept or decline such reasoning via a written explanation.[22]

No employer may take action against an employee or applicant whose positive test results have not been verified by a confirmation test and an MRO or, for state agencies, on the basis of any medical history revealed as part of the drug testing process.[23] Also, no employees except state agency special-risk personnel may be disciplined or discharged for voluntarily seeking treatment for a drug-related problem if they have not previously tested positive for illicit drugs, entered an employee assistance program for drug-related problems, or entered an alcohol and drug rehabilitation program.[24,25]

[18] Rules 59A-24.003(9) and 59A-24.008, F.A.C.
[19] Section 11.20455(13)(b), F.S., and Rule 59A-24.006(4)(e) and (f), F.A.C.
[20] Rule 59A-24.008, F.A.C.
[21] Rule 59A-24.006(4)(h), F.A.C.
[22] Sections 112.0455(8)(h)-(l) and 440.102(5)(g)-(j), F.S.
[23] Sections 112.0455(8)(m) and (p) and 440.102(5)(k), F.S.
[24] An employee assistance program is a program capable of providing expert assessment of personal concerns; confidential and timely identification services related to employee drug abuse; referrals for appropriate diagnosis, treatment, and assistance; and follow-up services for employees who participate in the program or require monitoring after returning to work. A drug rehabilitation program is an agency, practitioner, or hospital which is licensed under ch. 397, F.S., to provide substance abuse services and provides confidential, timely, and expert identification, assessment, and resolution of employee drug abuse. See: s. 440.102(1) and 397.311(33), F.S.
[25] Sections 112.0455(8)(t) and 440.102(5)(n), F.S.

No disciplinary action may be taken against a state agency employee on the sole basis of his or her first positive confirmed drug test, unless he or she has been given the opportunity to participate in an employee assistance program or drug and alcohol rehabilitation program and has either declined to participate, failed to complete, or refused to allow the employer to monitor the progress of such a program. These provisions do not apply to any publicly-employed special-risk personnel, who may be disciplined or discharged after a first offense.

Any public employee in a safety-sensitive or special-risk position may not hold such a position while participating in an employee assistance program or drug and alcohol rehabilitation program. He or she must be placed in a non-safety-sensitive position, or, if none is available, on leave status. A state agency employee may also be placed on leave status while participating in an inpatient rehabilitation program. Upon completion of the program, state agency employees will be reinstated to the same or equivalent positions as those they previously held.[26]

An executive branch employee who is disciplined or who is a job applicant for another position and is not hired pursuant to drug testing may file an appeal with the Public Employees Relations Commission. Appeals to this commission are the sole administrative remedy for such situations, although the employee may also submit a complaint through the collective bargaining grievance-arbitration process, if applicable. Any claims from any state employees which are not remediable though the actions of the commission or an arbitrator may be presented as a civil suit in a court of competent jurisdiction.[27]

Department of Corrections Drug Policy

Department of Corrections (department) employees are subject to random drug and alcohol testing, which occurs quarterly to a group of employees chosen by a computer program. Department staff in safety-sensitive or special-risk positions may also be tested if reasonable suspicion is present. In addition to the aforementioned guidelines for establishing reasonable suspicion, suspicion may also be based on violent behavior of an employee who is on or off duty. Regulations concerning the administration and security of drug tests, notification of results, and the appeals process are similar to those for other employees.

First-time failure of a drug test by staff other than law enforcement officers licensed under s. 943.13, F.S.—either through receiving a positive result, failing to submit to testing or follow appropriate protocols, or tampering with a sample—results in a mandatory referral to an employee assistance program and notification of the employee's licensing board. If the employee does not comply with the recommendations of the employee assistance program, he or she will be dismissed; otherwise, he or she may return to work in the same or an equivalent position after completion of the program and will be subject to follow-up drug testing.

First-time failure of a drug test by law enforcement officers results in dismissal.[28]

[26] Sections 112.0455(8)(m)-(v) and 440.102(11), F.S.
[27] Section 112.0455(14) and (15), F.S.
[28] Section 974.474, F.S., and Rule 33-206.503, F.A.C.

Confidentiality

Any information revealed by an employee during any part of the drug testing process is held confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. Such information may only be released by written consent of the person tested, by a court of competent jurisdiction, or by a licensing board as part of disciplinary proceedings. Information related to a safety-sensitive or special-risk employee may also be released if the MRO believes that it is relevant to the safety of the employee or others. Positive confirmed drug test results may be released to certifying bodies of special-risk employees for certification review purposes.[29]

Executive Order 11-58

In March 2011, Governor Rick Scott signed Executive Order 11-58, which required executive agencies to perform drug testing on all prospective new hires and to randomly test current employees, regardless of job classification, at least quarterly. However, the validity of this order has been challenged on the grounds that random drug testing constitutes a violation of the Fourth Amendment of the U.S. Constitution, relating to unreasonable search and seizure.[30] The case is currently ongoing, and the executive order has been suspended until the issue can be resolved.[31,32]

III. Effect of Proposed Changes:

Section 1 amends s. 112.0455, F.S., to delete the definition of "safety-sensitive" and any reference or language related to this term in the section. It also deletes language relating to special-risk positions from the definition of "job applicant" to allow state agencies to test any applicant for drugs. The bill authorizes random drug testing of employees, which may occur every 3 months.

The bill deletes provisions which stated that no state agency employee may be disciplined or discharged on the sole basis of his or her first positive drug test unless certain conditions are met as well as provisions relating to the work status of special-risk employees currently participating in employee assistance or drug and alcohol rehabilitation programs.

After receiving a first-time positive drug test result, an employee may be disciplined, discharged, or referred to an employee assistance or drug and alcohol rehabilitation program, in which the employee may participate at his or her expense or at the expense of a health insurance plan. If the employee enters an employee assistance program, the employer must determine whether he or she is able to continue to safely and effectively perform job duties while part of such a program.

[29] Sections 112.0455(11) and 440.102(8), F.S., and Rule 59A-24.008, F.A.C.
[30] The Fourth Amendment to the U.S. Constitution states "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall be issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
[31] *American Federation of State, County and Mun. Employees (AFSCME) Council 79 v. Scott*, 2011 WL 6157383, (S.D.Fla., 2011).
[32] Governor Memorandum to Agency Heads, June 10, 2011. Available at: http://www.aclufl.org/pdfs/ScottSuspensionMemo062011.pdf (last visited on January 19, 2012).

An employee is automatically considered unable to continue job duties while in treatment if he or she:

- Carries a firearm or works closely with someone who carries a firearm,
- Performs life-threatening procedures,
- Works with heavy or dangerous machinery,
- Works as a safety inspector,
- Works with children or detainees in the correctional system,
- Works with confidential information or documents pertaining to criminal investigations,
- Works with controlled substances,
- Holds a position subject to s. 110.1127, F.S.,[33] or,
- Holds a position in which a momentary lapse in attention could result in injury or death of another person.

An employee who is deemed unable to safely and effectively perform job duties while in treatment will be placed in a job assignment which the employer determines can be performed during treatment. If such a job is not available, the employee will be placed on leave status.

Section 2 amends s. 440.102, F.S., to require that, relating to public employers, only job applicants for special-risk or mandatory-testing positions may be subjected to drug testing. The term "mandatory-testing position" is defined to mean, with respect to a public employer, a job assignment that requires the employee to:

- Carry a firearm or work closely with someone who carries a firearm,
- Perform life-threatening procedures,
- Work with heavy or dangerous machinery,
- Work as a safety inspector,
- Work with children or 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., or,
- Hold a position in which a momentary lapse in attention could result in injury or death of another person.

"Mandatory-testing" replaces "safety-sensitive" wherever it is found in this section.

The bill expands language concerning applicability for employer drug-free workplace program discounts to provide that employers who exceed the minimum standards for the program will still qualify.

The bill deletes requirements that random drug testing must be specified in any collective bargaining agreement before testing is implemented and that drug-free workplace program requirements be a mandatory topic of negotiations in any collective bargaining agreement with

[33] This section requires additional security checks for employees whose work entails special trust or responsibility or a sensitive location. Such positions include any job with the Division of Treasury, positions providing care to vulnerable adults or the developmentally disabled, central abuse hotline operators, and others.

nonfederal public employees. A provision stating that s. 440.102, F.S., does not eliminate the bargainable rights as provided in the collective bargaining process is also deleted.

Section 3 amends s. 944.474, F.S., to allow the department to drug test all job applicants and deletes a reference to safety-sensitive positions. This change conforms this section to language in section 1 of the bill which allows state agencies to test all job applicants for drugs.

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of the bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution

D. Other Constitutional Issues:

Fourth Amendment Searches
The proposed bill may elicit a federal constitutional challenge under the Fourth Amendment's prohibition against unreasonable searches as incorporated under the Fourteenth Amendment. The Supreme Court has ruled on multiple occasions that random and suspicionless drug testing of employees is only allowable if an individual's privacy interest is outweighed by the government's "special need" to ensure public safety. "Special need" generally relates to employees who work in dangerous or hazardous professions.[34]

Privacy Rights
In addition, the proposed bill may be challenged under the federal constitution's right to privacy, implicitly provided under the Bill of Rights and under the Fourteenth Amendment. 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.[35]

[34] *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989); *Chandler v. Miller*, 520 U.S. at 308; *Marchwinski v. Howard*, 113 F.Supp.2d 1134, 1135 (E.D. Mich. 2000), and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).
[35] *Roe v. Wade*, 410 U.S. 113 (1973).

The proposed bill may elicit a challenge under Florida's constitutional privacy clause pursuant to s. 23, Art. I, of the Florida Constitution. Florida's constitutional right to privacy provides greater protection than the federal constitution, stating that every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein (although access to public records is allowed). The Florida Supreme Court has found that, if an individual has a "legitimate expectation of privacy," 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.[36]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Job applicants for any position in a state agency could be required to take drug tests. Additional employers may qualify for drug-free workplace program discounts. Employers who implement drug testing programs which exceed the minimum standards provided in statute and rule might incur costs to legally defend such programs depending on the nature and scope of the program implemented.

C. Government Sector Impact:

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

Agencies may also incur additional costs related to detecting additional drug-abusing employees due to increased testing. If such employees are dismissed, placed on leave, or transferred to other jobs during treatment, their jobs must be performed by someone else in the interim. Likewise, the Public Employees Relations Commission may experience a higher volume of claims related to drug testing.

The agency and the Department of Management Services are likely to experience negligible impact from the provisions of this bill. Fiscal impacts on state government, local government, and the private sector are indeterminate as the impact relies on the extent to which each organization decides to expand its drug testing procedures in response to new statutory authority.[37]

This bill is likely to generate litigation against the state government related both to expansion in drug testing authority and to deletion of collective bargaining provisions.

[36] *City of North Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995).
[37] Department of Management Services, *2012 Bill Analysis for SB 1358*. A copy is on file with the Senate Health Regulation Committee.

VI. Technical Deficiencies:

The bill's title does not include a reference to the redefinition of "job applicant" made in line 103 of the bill.

The bill's title also 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. Perhaps this should be amended to conform to language in the remainder of the bill.

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. Perhaps this language should be amended to include drug and alcohol treatment programs as well to provide more options for employees and to conform to current statute.

The definition of "job applicant" in lines 103-106 is not consistent with that in lines 438-440. Implementation of the two sections of law may prove problematic.

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:

None.