

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 Committee on Commerce and Tourism

BILL: SB 890

INTRODUCER: Senator Baxley

SUBJECT: Drug-free Workplaces

DATE: March 15, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	McKay	CM	Pre-meeting
2.			JU	
3.			RC	

I. Summary:

SB 890 makes changes to the drug-free workplace program in ch. 440, F.S.

Under current law, an employer who implements such a program is eligible for a workers' compensation insurance discount of up to 5 percent. If an employee in such a program tests positive for drugs or alcohol, the employee may be terminated, and forfeits his or her eligibility for medical and indemnity benefits.

Specifically, the bill:

- Amends the definition of "drug" to include substances named in state and federal law;
- Adds additional certification requirements for drug tests and specimens;
- Requires follow-up testing to be done at least six times, up from two times in current law;
- Removes a requirement that an employee be provided a form on which to note medications, which must be taken into account in interpreting drug tests;
- Replaces a list of professions qualified to collect specimens with a requirement that such persons meet qualification standards set by specified federal agencies;
- Requires specimens from positive tests to be preserved for one year after the confirmation test was conducted, instead of 210 days after result was mailed; and
- Shortens from 180 to 60 days after notification of a positive result the period during which an employee may have a specimen retested.

The bill takes effect July 1, 2019.

II. Present Situation:

Drug-Free Workplace Program

The Workers' Compensation Law in Chapter 440, F.S., provides legislative intent to promote drug-free workplaces, and sets out the notice, educational, and procedural requirements that an employer must follow to implement the employee and applicant drug testing that is a component of such workplaces.¹ An "employer" means a person or entity that employs a person and that is covered by the Workers' Compensation Law.²

If an employer implements a drug-free workplace program that conforms to applicable law and rules, the employer is eligible for workers' compensation and employer's liability insurance discounts³ of up to five percent,⁴ and the employer may require an employee to submit to a test for the presence of drugs or alcohol. If an employee in a drug-free workplace program tests positive for drugs or alcohol, the employee may be terminated, and forfeits his or her eligibility for medical and indemnity benefits.⁵

Definitions

The following definitions apply to a drug-free workplace program implemented pursuant to law or to rules adopted by the Agency for Health Care Administration (AHCA):

- "Drug" means alcohol, including a distilled spirit, wine, a malt beverage, or an intoxicating liquor; an amphetamine; a cannabinoid; cocaine; phencyclidine (PCP); a hallucinogen; methaqualone; an opiate; a barbiturate; a benzodiazepine; a synthetic narcotic; a designer drug; or a metabolite of any of the substances listed in this paragraph.
- "Drug test" or "test" means any chemical, biological, or physical instrumental analysis administered, by a laboratory certified by the U.S. Department of Health and Human Services or licensed by the AHCA, for the purpose of determining the presence or absence of a drug or its metabolites.
- "Specimen" means tissue, hair, or a product of the human body capable of revealing the presence of drugs or their metabolites, as approved by the U.S. Food and Drug Administration or the AHCA.⁶

Notice

One time only, prior to testing, an employer must give all employees and applicants for employment a written policy statement that contains:

- A general statement of the employer's policy on employee drug use identifying the types of drug testing an employee or applicant may be required to submit to, and the actions the

¹ See ss. 440.101 and 440.102, F.S.

² Section 440.102(1)(h), F.S.

³ Section 440.102(2), F.S. See s. 627.0915, F.S., providing that the Office of Insurance Regulation must approve rating plans for workers' compensation and employers' liability insurance that give specific identifiable consideration in the setting of rates to employers that implement a drug-free workplace program pursuant to s. 440.102 F.S., and attendant rules.

⁴ Fla. Admin Code R. 69L-5.220 (2019)

⁵ Section 440.101(2), F.S.

⁶ Section 440.102(1), F.S.

employer may take against an employee or applicant on the basis of a positive confirmed drug test result;

- A statement advising the employee or job applicant of the existence of s. 440.102, F.S.;
- A general statement concerning confidentiality;
- Procedures for employees and job applicants to confidentially report to a medical review officer the use of prescription or nonprescription medications both before and after being tested;
- A list of the most common medications, by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test;
- The consequences of refusing to submit to a drug test;
- A representative sampling of names, addresses, and telephone numbers of employee assistance programs and local drug rehabilitation programs;
- A statement that an employee or applicant who receives a positive confirmed test result may contest or explain the result to the medical review officer within 5 working days after receiving written notification of the test result; that if an employee's or applicant's explanation or challenge is unsatisfactory to the medical review officer, the medical review officer must report a positive test result back to the employer; and that a person may contest the drug test result;
- A statement informing the employee or job applicant of his or her responsibility to notify the laboratory of any administrative or civil action brought pursuant to the drug-free workplace law;
- A list of all drugs for which the employer will test, described by brand name or common name, as well as by chemical name;
- A statement regarding any applicable collective bargaining agreement or contract and the right to appeal to the Public Employees Relations Commission or applicable court; and
- A statement notifying employees and job applicants of their right to consult with a medical review officer for technical information regarding prescription or nonprescription medication.⁷

An employer must include notice of drug testing on vacancy announcements for positions for which drug testing is required.⁸

Types of Testing

An employer is required to conduct job applicant, reasonable-suspicion, and routine fitness-for-duty drug testing. If an employee in the course of employment enters an employee assistance program for drug-related problems, or a drug rehabilitation program, the employer must require the employee to submit to a drug test as a follow-up to such program, unless the employee voluntarily entered the program. If follow-up testing is required, it must be conducted at least once a year for a 2-year period after completion of the program.⁹

⁷ Section 440.102(3)(a), F.S.

⁸ Section 440.102(3)(c), F.S.

⁹ Section 440.102(4), F.S.

Procedures

All specimen collection and testing for drugs pursuant to s. 440.102, F.S., must be performed in accordance with the following procedures:

- Samples must be collected with due regard to privacy of the individual providing the sample, and in a manner reasonably calculated to prevent substitution or contamination of the sample.
- Specimen collection must be documented, and the documentation procedures must include:
 - Labeling of specimen containers, and
 - A form for the employee or job applicant to provide any information he or she considers relevant to the test, including identification of currently or recently used prescription or nonprescription medication or other relevant medical information. The form must provide notice of the most common medications by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. The providing of information shall not preclude the administration of the drug test, but must be taken into account in interpreting any positive confirmed test result;
- Specimen collection, storage, and transportation to the testing site must be performed in a manner that reasonably precludes contamination or adulteration of specimens;
- Each confirmation test conducted must be conducted by a licensed or certified laboratory;
- A specimen for a drug test may be taken or collected by any of the following persons:
 - A physician, a physician assistant, a registered professional nurse, a licensed practical nurse, or a nurse practitioner or a certified paramedic who is present at the scene of an accident for the purpose of rendering emergency medical service or treatment; or
 - A qualified person employed by a licensed or certified laboratory;
- A person who collects or takes a specimen for a drug test shall collect an amount sufficient for two drug tests as determined by the Agency for Health Care Administration.
- Every specimen that produces a positive, confirmed test result must be preserved by the licensed or certified laboratory that conducted the confirmation test for a period of at least 210 days after the result of the test was mailed or otherwise delivered to the medical review officer. However, if an employee or job applicant undertakes an administrative or legal challenge to the test result, the employee or job applicant shall notify the laboratory and the sample must be retained by the laboratory until the case or administrative appeal is settled. During the 180-day period after written notification of a positive test result, the employee or job applicant who has provided the specimen shall be permitted by the employer to have a portion of the specimen retested, at the employee's or job applicant's expense, at another laboratory, licensed and approved by the AHCA, chosen by the employee or job applicant. The second laboratory must test at equal or greater sensitivity for the drug in question as the first laboratory;
- Within 5 working days after receipt of a positive confirmed test result from the medical review officer, an employer must inform an employee or job applicant in writing of such positive test result, the consequences of such results, and the options available to the employee or job applicant. The employer must provide to the employee or job applicant, upon request, a copy of the test results;
- Within 5 working days after receiving notice of a positive confirmed test result, an employee or job applicant may submit information to the employer explaining or contesting the test result, and explaining why the result does not constitute a violation of the employer's policy;
- The employee's or job applicant's explanation or challenge of the positive test result is unsatisfactory to the employer, a written explanation as to why the employee's or job

applicant's explanation is unsatisfactory, along with the report of positive result, shall be provided by the employer to the employee or job applicant; and all such documentation shall be kept confidential by the employer pursuant to subsection (8) and shall be retained by the employer for at least 1 year;

- An employer may not discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an employee or job applicant on the sole basis of a positive test result that has not been verified by a confirmation test and by a medical review officer;
- An employer that performs drug testing or specimen collection must use chain-of-custody procedures established by the AHCA;
- An employer shall pay the cost of all drug tests, initial and confirmation, which the employer requires of employees. An employee or job applicant shall pay the costs of any additional drug tests not required by the employer;
- An employer shall not discharge, discipline, or discriminate against an employee solely upon the employee's voluntarily seeking treatment, while under the employ of the employer, for a drug-related problem if the employee has not previously tested positive for drug use, entered an employee assistance program for drug-related problems, or entered a drug rehabilitation program;
- If drug testing is conducted based on reasonable suspicion, the employer must promptly detail in writing the circumstances which formed the basis of the determination that reasonable suspicion existed to warrant the testing; and
- All authorized remedial treatment, care, and attendance provided by a health care provider to an injured employee before medical and indemnity benefits are denied under s. 440.102, F.S., must be paid for by the carrier or self-insurer.

Confirmation Testing

If an initial drug test is negative, the employer may in its sole discretion seek a confirmation test, which may be conducted only by licensed or certified laboratories. All positive initial tests must be confirmed using gas chromatography/mass spectrometry (GC/MS) or an equivalent or more accurate scientifically accepted method approved by the AHCA or the U.S. Food and Drug Administration as such technology becomes available in a cost-effective form. If an initial drug test of an employee or job applicant is confirmed as positive, the employer's medical review officer must provide technical assistance to the employer and to the employee or job applicant for the purpose of interpreting the test result to determine whether the result could have been caused by prescription or nonprescription medication taken by the employee or job applicant.

Employer Protection

An employee or job applicant whose drug test result is confirmed as positive in accordance with s. 440.102, F.S., shall not, by virtue of the result alone, be deemed to have a "handicap" or "disability" as defined under federal, state, or local handicap and disability discrimination laws.

An employer who discharges or disciplines an employee or refuses to hire a job applicant in compliance with this section is considered to have discharged, disciplined, or refused to hire for cause.

III. Effect of Proposed Changes:

The bill makes numerous changes to the procedures relating to drug-free workplaces in s.440.102, F.S.

Definitions

The bill amends the definition of “drug” by specifying that alcohol means any substance containing any form of alcohol, including ethanol, methanol, propanol, and isopropanol. A controlled substance includes those identified under Schedules I, II, III, IV, or Schedule V of s. 893.03, F.S.;¹⁰ and any controlled substance identified under Schedules I, II, III, IV, or V of the Controlled Substances Act, 21 U.S.C. s. 812(c).

A “drug test,” when testing for alcohol, must be conducted in accordance with the United States Department of Transportation alcohol testing procedures authorized under 49 C.F.R. part 40, subparts J through M.¹¹

The U. S. Department of Health and Human Services (HHS) and U. S. Department of Transportation (USDOT) are added to the list of governmental agencies that can approve what “specimen” means.

Notice

The bill changes the written policy statement that employers are required to give to all employees and applicants prior to testing by removing from the procedures for employees and job applicants to confidentially report to a medical review officer their use of prescription or nonprescription medications to a medical review officer both before and after being tested. The bill also removes the requirement that the policy contain the brand name of drugs being tested for.

Testing

Under current law, if follow-up drug testing is required because an employee in the course of employment enters an employee assistance program for drug-related problems, or a drug rehabilitation program, the testing must be conducted once a year for a 2-year period after completion of the program.

The bill changes the amount of required follow-up testing to at least six times in the first year, and provides that testing may be conducted twice for 1 additional year.

¹⁰ Section 893.03, F.S., classifies controlled substances into five categories, known as schedules. These schedules regulate the manufacture, distribution, preparation, and dispensing of the substances listed in the schedules. The most important factors in determining the schedule classification of a substance are the “potential for abuse” of the substance and whether there is a currently accepted medical use for the substance in the United States.

¹¹ This rule describes required procedures for conducting workplace drug and alcohol testing for the federally regulated transportation industry. See <https://www.transportation.gov/odapc/part40> (last visited March 15, 2019).

Procedures

The bill deletes a labeling requirement for specimen containers for saliva or breath testing when not being transported to a laboratory for analysis.

The bill deletes a requirement that a form must be provided upon which an employee may provide information considered by the employee to be relevant to the test, including the use of medication, and deletes the requirement that such information be taken into account in interpreting positive confirmed test results.

The bill replaces a requirement that a drug test specimen may be collected by a physician, physician assistant, registered professional nurse, licensed practical nurse, nurse practitioner, certified paramedic at scene of accident, or qualified lab employee with a requirement that a specimen may be collected by a person who meets the qualification standards for urine or oral fluid specimen collection as specified by the HHS or the USDOT. For alcohol testing, a person must meet the USDOT for a screening test technician or a breath alcohol technician. A hair specimen may be collected and packaged by a person who has been trained and certified by a drug testing laboratory. A person who directly supervises an employee subject to testing may not serve as the specimen collector for that employee unless there is no other qualified specimen collector available.

The bill clarifies that a specimen amount should be sufficient for two independent drug tests - one to screen the specimen and one to confirm the screening results.

The bill extends from 210 days to one year the amount of time a specimen that produces a positive, confirmed test must be preserved.

The bill shortens from 180 days to 60 days the period after a positive test during which an employee or applicant may have the sample retested.

The bill provides that a second lab must test the specimen at the limit of detection for the drug or analyte confirmed by the original, and if the drug or analyte is detected by the second laboratory, the result must be reported as reconfirmed positive.

The bill deletes a requirement that an applicant or employee's explanation or challenge of a positive test must be provided to the applicant or employee.

Current law provides that an employer may not discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an employee or job applicant on the sole basis of a positive test result that has not been verified by a confirmation test and by a medical review officer. The bill removes the confirmation test as a condition, and creates an exception when a confirmed positive breath alcohol test was conducted in accordance with U.S. Department of Transportation alcohol testing procedures.

An employer that performs drug testing or specimen collection must use chain-of-custody procedures established by the Agency for Health Care Administration, or, added by the bill, procedures established by *the HHS, or the USDOT*.

Confirmation Testing

The bill removes a provision specifying that, if an initial drug test is negative, the employer may in its sole discretion seek a confirmation test, and removes a provision that only licensed or certified laboratories may conduct confirmation drug tests.

The bill provides that all laboratory positive initial tests on a urine, oral fluid, blood, or hair specimen must be confirmed using gas chromatography/mass spectrometry or an equivalent or more accurate scientifically accepted method approved by the HHS or the USDOT, and removes a provision that the tests can be confirmed by methods approved by the AHCA or the U.S. Food and Drug Administration.

The bill provides that for a breath alcohol test, an initial positive result must be confirmed by a second breath specimen taken and tested using an evidential breath testing device listed on the conforming products list issued by the National Highway Traffic Safety Administration and conducted in accordance with USDOT alcohol testing procedures authorized under 49 C.F.R. part 40, subparts J through M.

Employer Protection

The bill provides that an employee or job applicant whose drug test result is confirmed *or verified* as positive shall not, by virtue of the result alone, be deemed to have a “handicap” or “disability” as defined under federal, state, or local handicap and disability discrimination laws.

Drug-Testing Standards for Laboratories

The bill removes a requirement that lab reports of drug tests must include any correlation between medication reported by the employee or applicant and the test result, consistent with lines 145-154 of the bill, which delete the requirement that an employee or applicant be provided a form to list currently or recently used medication.

Effective date

The bill takes effect July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 440.102 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.