

STORAGE NAME: h1519.go

DATE: March 28, 2000

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
ANALYSIS**

BILL #: HB 1519

RELATING TO: Drug-Free Workplaces

SPONSOR(S): Representative Lynn

TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) HEALTH CARE LICENSING & REGULATION YEAS 10 NAYS 3
 - (2) GOVERNMENTAL OPERATIONS
 - (3) INSURANCE
 - (4) HEALTH & HUMAN SERVICES APPROPRIATIONS
 - (5)
-

I. SUMMARY:

This bill transfers the drug-free workplace requirements for public employers from s. 112.0455, F.S., to chapter 442, F.S., and the requirements for private employers from chapter 440, F.S., to chapter 442, F.S. This bill eliminates duplicate provisions of the two programs and combines them into one comprehensive Florida Government Drug-Free Workplace Act. The Office of Drug Control within the Executive Office of the Governor is designated as the "umbrella agency" for the purpose of coordinating implementation of the program among agencies and departments. This bill revises provisions relating to drug testing, employee or job applicant notification and protection, employer protection, licensure and certification of drug testing laboratories, and standards for drug testing. It provides for rules necessary for implementation of the act to be adopted by various state agencies.

This bill provides a discount on workers' compensation rates for employers that maintain a drug-free workplace pursuant to ss. 442.02 and 442.03, F.S.

Except as otherwise provided, this bill provides an effective date of October 1, 2000.

This bill has an indeterminate fiscal impact on state government. Please see the fiscal comments section for further details.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

This bill expands the responsibilities of the Department of Labor and Employment Security, the Division of Workers' Compensation, and the Office of Drug Control to promulgate rules pursuant to this act.

B. PRESENT SITUATION:

Section 112.0455, F.S., is known as the Drug-Free Workplace Act and outlines the standards to which employers must conform when implementing a drug-testing program. This section is applicable to all state government workplaces. Section 440.102, F.S., outlines the standards to which private sector employers must conform when establishing a drug-testing program.

Public Sector

No Legal Duty to Test

Section 112.0455(4), F.S., provides that there is no legal duty for employers to request an employee or job applicant to undergo drug testing. Drug tests may not be conducted until the employer has identified local drug abuse assistance programs.

Notice to Employees

Employers are required to notify employees and job applicants of the employer's drug-testing policy. An employer must give employees a 60-day notice before implementing a drug-testing program. Prior to testing, all employees and job applicants shall be given a written summary of the employer's policy regarding drug-testing.

This summary includes:

- the types of testing to which an employee or applicant may be required to submit;
- the actions that an employer may take against an employee or applicant on the basis of a positive test result;
- a statement advising the employee of s. 112.9455, F.S.;
- a statement of the procedures regarding confidentiality;
- the consequences of refusing to submit to a drug test;
- the addresses and phone numbers of local employee assistance programs;
- a statement of the procedure for contesting a positive drug test result as well as any applicable collective bargaining agreement and the right to appeal to the Public Employees Relations Commission;

- a list of all drugs for which the employer will test; and
- a statement informing employees and job applicants of their right to consult the testing laboratory for information regarding prescription and nonprescription medication.

Types of Testing

Public employers are authorized, but not required, to conduct the following types of tests:

- Job applicant drug tests -- an employer may require applicants applying for positions that are contingent upon passing a drug test to take and pass a drug test. Refusal to take a drug test or the receipt of a confirmed positive test result are grounds for refusing to hire a job applicant.
- Reasonable suspicion drug tests -- An employer may require an employee to submit to reasonable suspicion drug tests.
- Routine fitness-for-duty drug tests -- An employer may require an employee to submit to a drug test if the test is part of a routinely scheduled employee fitness-for-duty medical examination, is part of the employer's established policy, or is scheduled routinely for all members of a certain employment classification.
- Follow-up drug test -- If the employee in the course of employment enters into an employee assistance program for drug-related problems, the employer may require the employee to submit to a drug test, unless the employee voluntarily entered into the program.

Procedures and Employee Protection

The employer must follow specific procedures for the collection and analysis of specimens. Only authorized persons may collect specimens for drug tests. All drug tests must be conducted by a laboratory licensed by the Agency for Health Care Administration (AHCA). An employee must be notified by the employer within five days of a positive confirmed test. The employee then has five days to submit a written explanation contesting the test results. Also, the employee may have a portion of the original specimen reexamined at his own expense by a duly licensed or certified laboratory.

No employer may discharge, discipline, or refuse to hire any employee or applicant on the basis of a positive test result that has not been verified by a confirmation test. The employer may not fire an employee for the first confirmed positive drug test unless that employee refuses to participate in and successfully complete an employee assistance program. An *employee in a safety-sensitive position* may be placed in a non-safety-sensitive position or placed on leave status while participating in an employee assistance program. A *special risk employee* may be discharged or disciplined for the first positive confirmed drug test if the test result confirms illicit drugs pursuant to s. 893.13, F.S.

Confirmation Testing

If an initial drug test is negative, the employer may at its sole discretion, and at the employer's expense, seek a confirmation test. All positive test results must be confirmed using gas chromatography/mass spectrometry or an equivalent or more scientifically accurate test.

Employer Protection

An employer who discharges or disciplines an employee pursuant to this section will be considered to have discharged or disciplined the employee for cause. Employers are allowed to establish reasonable rules regarding employee possession, use, sale, or solicitation of drugs and to take appropriate actions based upon a violation of those rules. Employers are allowed to continue normal medical screening as required by statute, rule, or regulation for the purpose of monitoring exposure of employees to toxic or other unhealthy substances in the workplace.

Confidentiality

All information, reports, and test results produced as a result of this section are confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

Drug Testing Laboratories, Standards

Laboratories conducting drug tests must be licensed by AHCA using criteria established by the United States Department of Health and Human Services. The agency shall require background screening of the managing officer responsible for the daily operation of the laboratory and of the chief financial officer.

Rules

AHCA may promulgate rules concerning standards for drug-testing laboratory licensing, appropriate specimen collection for analysis, methods for analysis to ensure reliable drug-testing, minimum cutoff detection levels for drugs, chain-of-custody procedures, retention, storage, and transportation procedures to ensure reliable test results, and a list of the most common medications that may affect or alter a drug test.

The Department of Management Services may adopt rules for all executive branch agencies; the Board of Regents may adopt rules for the State University System; the State Courts Administrator may adopt rules for the state court system; the Justice Administrative Commission may adopt rules on behalf of the state attorneys and public defenders; and the Office of Capital Collateral Representative of Florida, and the Judicial Qualifications Commission, and the President of the Senate and the Speaker of the House may adopt rules for employees and members of the Legislature.

Discipline Remedies

An executive branch employee who is disciplined or a job applicant who is not hired pursuant to this section may file an appeal with the Public Employees Relations Commission (PERC) or file a collective bargaining grievance, if available. Relief from PERC may include:

- rescinding the disciplinary action, expunging the related records from the personnel file, and reinstating the employee;
- mandating that the job applicant be given the next available comparable or equivalent job;
- back pay and benefits; and
- reimbursement of necessary costs of the appeal, reasonable attorney's fees, and expert witness fees.

Non-Discipline Remedies

Any person alleging a violation of the provisions of this act that is not remediable by the commission or an arbitrator may institute a civil action for injunctive relief or damages. Relief is limited to an order restraining the continued violation of this section, reimbursement for the costs of litigation, expert witness fees, reasonable attorney's fees, and noneconomical damages. The damages shall be limited to the recovery of damages directly resulting from injury or loss caused by each violation of this section.

Federal Compliance

Drug testing procedures in this section do not apply where the specific work performed requires employees or job applicants to submit to drug testing under federal regulations.

Fees

Fees from the licensure of drug testing laboratories shall be sufficient to carry out the responsibilities of AHCA. For licensure as a drug testing laboratory the fee shall not be less than \$8,000 per year or more than \$10,000 per year. For late filing, an additional fee of \$500 per day shall be assessed.

Private Sector

No Legal Duty to Test

Private sector employers who maintain a drug free workplace pursuant to s. 440.102, F.S., are eligible to receive the discounts provided under s. 627.0915, F.S., and may deny medical and indemnity benefits to certain employees. The drug-free workplace programs must conform to s. 440.102, F.S. However, private employers have no legal duty to request an employee or job applicant to submit to drug testing.

Notice to Employees

Private employers must provide the same notification to employees or job applicants that public employers provide.

Types of Testing

Private employers wishing to maintain a drug-free workplace must conduct the following types of drug tests:

- Job applicant drug tests -- an employer must require applicants applying for positions that are contingent upon passing a drug test to take and pass a drug test. Refusal to take or receiving a confirmed positive test result are grounds for refusing to hire a job applicant.
- Reasonable-suspicion drug tests -- An employer must require an employee to submit to reasonable-suspicion drug tests.
- Routine fitness-for-duty drug tests -- An employer must require an employee to submit to a drug test if the test is part of a routinely scheduled employee fitness-for-duty medical examination or is part of the employer's established policy or that is scheduled routinely for all members of a certain employment classification.

- Follow-up drug test -- If the employee in the course of employment enters into an employee assistance program for drug-related problems, the employer must require the employee to submit to a drug test, unless the employee voluntarily entered into the program.

Procedures and Employee Protection

The procedures and employee protections are the same for both public and private drug-free workplaces except that a private employer may fire, discipline, or refuse to hire an employee or job applicant based upon the first incident of a confirmed positive test result that has been reviewed by the employer's medical review officer. Also, the employer is not required to help the employee obtain rehabilitation through an employee assistance program. If an employee voluntarily seeks treatment while employed and if the employee has never previously tested positive for drug use, then the employer may not discharge, discipline, or fire the employee. The employer may deny certain benefits to an employee who receives a confirmed positive test result that has been reviewed by the employer's medical review officer.

Confirmation Testing

The same standards apply to private employer drug-free workplace programs as apply to public employer programs.

Employer Protection

The standards in this section are identical to those in the public drug-free workplace section except that a private employer is not required to refer an employee with a first-time positive confirmed drug test to an employee assistance program. The employer may immediately discipline or discharge the employee.

Confidentiality

The same standards apply to private employer drug-free workplace programs as apply to public employer programs.

Drug Testing Standards, Laboratories

Laboratories conducting drug tests must be licensed by AHCA or certified by the United States Department of Health and Human Services.

Rules

AHCA may promulgate rules pursuant to s. 112.0455, F.S., concerning standards for drug-testing laboratory licensing, appropriate specimen collection for analysis, methods for analysis to ensure reliable drug testing, minimum cutoff detection levels for drugs, chain-of-custody procedures, and retention, storage, and transportation procedures to ensure reliable test results.

Denial of Benefits

If an employer implements a drug-free workplace program, and follows the procedures in s. 440.102, F.S., any employee that tests positive for drugs may be fired and may be forced to forfeit his or her eligibility for medical and indemnity benefits.

Collective Bargaining Rights

This section does not eliminate rights as provided in the collective bargaining process if applicable.

C. EFFECT OF PROPOSED CHANGES:

This bill designates the Office of Drug Control within the Executive Office of the Governor as the “umbrella agency” to oversee the coordination among the state agencies which are responsible for implementing the drug-free workplace provisions of ss. 442.02 and 442.03, F.S.

These new sections are designated as the Florida Government Drug-Free Workplace Act. This bill combines certain provisions that were previously included in s. 112.0455, F.S., with the provisions in ss. 440.101 and 440.102, F.S.

The new Florida Government Drug-Free Workplace Act is intended to regulate all employers, both public and private, that wish to maintain a drug-free workplace. This bill entitles an employer who complies with s. 440.02, F.S., to receive a 10% discount on the rate for his or her workers’ compensation insurance. If an employer implements a drug-free workplace program under this Act and an employee receives a positive drug test, that employee may be terminated and may forfeit eligibility for medical and indemnity benefits as well as unemployment compensation benefits.

This bill updates the definitions found in s. 442.03, F.S. A “certified laboratory” as well as a “licensed laboratory” are certified by the Federal Substance Abuse and Mental Health Services Administration (SAMHSA). In addition, the “confirmation test” is a second analytical procedure used to identify a drug’s presence or a more accurate scientifically accepted method approved by the Department of Health and Human Services Mandatory Guidelines for Federal Workplace Drug Testing Programs (DHHS Guidelines). “Drug” is updated and specimens and initial drug tests must abide by DHHS Guidelines. A “medical review officer” must be a physician who is certified in the law and methodology of drug testing.

This bill retains the standards for notifying employees of a drug testing policy that are currently in s. 440.102, F.S. It requires both public and private employers to conduct drug tests in order to be certified as a drug-free workplace. If in the course of employment, an employee suffers an accident for which he or she receives medical attention, the employer must require the employee to submit to a drug test as a consequence of the accident.

This bill retains the procedures and employee protections previously found in s. 440.102, F.S., and requires both public and private employers to abide by these standards. The standards for confirmation testing remain the same as in s. 440.102, F.S., except that an employer may not seek a confirmation test if an original drug test is negative. The bill makes no changes to the employer protection and confidentiality standards listed in s. 440.102, F.S, but requires both public and private employers to follow these guidelines. If an employee’s explanation of a positive test is unsatisfactory to the employer, upon written request by the employee within 5 days after the final notification of the positive result, a written explanation by the employer shall be provided to the employee.

This bill incorporates the laboratory licensure guidelines from s. 112.0455, F.S., into s. 442.03, F.S. It provides that a laboratory may analyze initial or confirmation drug specimens if it is licensed by AHCA or certified by the United States Department of Health

and Human Services. This bill provides the requirements that a laboratory must abide by to receive this licensure and certification.

The bill requires AHCA to adopt rules for laboratories and medical review officers engaged in drug-free workplace testing. The rules will be modeled after the guidelines established by the United States Department of Health and Human Services and the United States Department of Transportation. The rules will include:¹

- standards for licensing and certifying drug-testing laboratories;
- standards for collecting drug specimens;
- standards for testing and reporting drug test results;
- grounds for disciplinary action against a licensed drug-free workplace laboratory including licensure denial, suspension, revocation, and annulment;
- imposition of administrative fines;
- specimens that may be used for drug-free workplace drug-testing;
- minimum specimen amounts appropriate for drug-testing;
- methods of analysis;
- minimum cutoff levels for each drug found in body specimens and capable of revealing the presence of drugs or metabolites of drugs;
- chain of custody procedures;
- retention, storage and transportation procedures for retests;
- list of common medications which may alter or affect a drug test;
- standards for proficiency testing, quality control and quality assurance;
- requirements for qualifications of medical review officers;
- requirements for statistical reporting from licensed and certified laboratories; and
- inspection of licensed and certified drug-testing laboratories.

The Department of Labor and Employment Security is authorized to adopt any rules necessary to implement the provisions of this section.

This bill adds the disciplinary and non-disciplinary remedies found in s. 112.0455, F.S., to s. 442.03, F.S. All public employees may appeal through the disciplinary remedies outlined in this section. Either public or private employees may appeal through the non-disciplinary remedies.

This bill creates reporting and accountability standards. The employer or carrier will report to the Division of Workers' Compensation information related to the establishment of a drug-free workplace in accordance with the rules adopted by the division to monitor the effectiveness of drug-free workplaces.

This bill requires employers to educate employees in order to become certified as a drug-free workplace. The Division of Workers' Compensation will adopt rules to specify the educational requirements that must be provided by employers.

This bill provides that any drug testing program must allow for a final review by a medical review officer. A review of all test results will be conducted prior to a report being submitted to an employer.

¹All of these rules must be promulgated not inconsistent with or duplicative of existing federal drug-free workplace programs referenced in this section.

This bill provides that an employee who works in a drug-free workplace who tests positive for drugs under federal regulations or refuses to submit to such testing shall be disciplined pursuant to s. 442.03, F.S.

This bill requires that the Department of Insurance approve rating plans for workers' compensation that give a 10% discount in the setting of rates for employers who implement a drug-free workplace program, implement a safety program approved by the Division of Safety, or implement both a drug-free workplace program and a safety program approved by the Division of Safety.

This bill also deletes the repeal of all of chapter 442, F.S., and retains the repeal of certain sections of chapter 442, F.S.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 112.0455, F.S., substantially rewording said section and providing short title, purposes, and legislative findings.

Section 2. Amends s. 397.332(2)(h), F.S., designating the Office of Drug Control within the Executive Office of the Governor as the "umbrella agency to ensure coordination among the agencies or departments which are responsible for implementing the drug-free workplace provisions."

Section 3. Creates s. 442.01, F.S., providing a short title indicating that ss. 442.02 and 442.03, F.S., may be referred to as the "Florida Government Drug-Free Workplace Act."

Section 4. Transfers ss. 440.101 and 440.102, F.S., to the new ss. 442.02 and 442.03, F.S., respectively, and renumbers and amends said sections. This section creates a new Florida Government Drug-Free Workplace Act and rewords the language in s. 440.101, F.S., to include both public and private employers. This section provides for eligibility for certain insurance rate discounts under certain circumstances and provides for ineligibility under certain circumstances. It revises provisions relating to drug testing, notice to employees and job applicants, types of testing, procedures and employee protection, confirmation testing, employer protection, and confidentiality. It revises provisions relating to licensure and certification of drug-testing laboratories, drug-testing standards for laboratories, and rules of the Agency for Health Care Administration relating to drug-testing laboratories. This section revises provisions relating to state employees in safety-sensitive positions or special-risk positions, denial of benefits, discipline and non-discipline remedies, and collective bargaining rights. This section requires employers to educate employees regarding drug-free workplace standards and requires a final review of drug test results by a medical review officer.

Section 5. Amends s. 627.0915, F.S., requiring that the Department of Insurance approve rating plans for workers' compensation insurance providing a 10% discount to employers that implement a drug-free workplace program, implement a safety program approved by the Division of Safety of the Department of Labor and Employment Security, or implement both a drug-free workplace program and an approved safety program.

Section 6. Amends s. 440.09(7)(a), F.S., to conform cross references to the newly created ss. 442.02 and 442.03, F.S.

Section 7. Amends s. 443.101, F.S., to conform cross references to the newly created ss. 442.02 and 442.03, F.S.

Section 8. Amends s. 443.1715(3), F.S., to conform cross references to the newly created ss. 442.02 and 442.03, F.S.

Section 9. Effective upon becoming a law, amends s. 14, chapter 99-240, Laws of Florida, to delete the repeal of chapter 442, F.S., to retain the repeal of certain sections of chapter 442, F.S., and to correct an incorrect section reference.

Section 10. Except as otherwise provided, provides an effective date of October 1, 2001.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See fiscal comments section.

2. Expenditures:

There is a cost of implementation of the drug-testing program as well as the cost of the drug tests themselves. Please see fiscal comments section for a more in-depth analysis.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Private employers who implement a drug-free workplace will have to sustain the cost of implementation as well as the drug-testing. However, private employers who maintain a drug-free workplace pursuant to ss. 442.02 and 442.03, F.S., will receive a discount on their workers' compensation insurance rates. Also, these employers will experience a reduction in their workers' compensation claims as they will be allowed to deny benefits to any employee who is injured and tests positive for drugs.

Maintaining a drug-free workplace should also benefit employers through increased employee productivity and higher employee morale.

D. FISCAL COMMENTS:

According to the Department of Management Services, this bill will have an indeterminate fiscal impact on state agencies. The National Drug Institute on Drug Abuse and the

National Institute on Alcohol Abuse and Alcoholism estimated that the cost to America in lost productivity due to drug abuse was \$69.4 billion in 1992.²

It is not clear what impact this will actually have on state agencies. According to a survey conducted by DMS in May, 1999, of 36 State agencies, 22 administer pre-employment drug tests, 21 administer reasonable suspicion drug tests, nine give fitness-for-duty drug tests, and nine do follow-up testing. In 1998, the State of Florida purchased a large policy insuring workers' compensation claims over \$1 million. A reduction in workers' compensation insurance rates could benefit the State if it met the requirements of a drug-free workplace.

There could be an increase in costs if all State employees are to be tested. But if only certain classes of State employees are to be tested, the cost would be lower.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds or take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Safety sensitive positions, as defined by case law, are an exception to the 4th and 14th Amendments to the U.S. Constitution, which together generally prevent search and seizure by states absent individualized suspicion. This bill expands the category of safety-sensitive positions.³ The Florida Constitution has been interpreted by courts as expanding individuals' privacy rights over protections provided by the U.S. Constitution. These concerns could be ameliorated by reference to a noted drug problem among the group of employees for whom it permits drug testing.

²1999 Florida Drug Control Strategy, p. 2-8.

³Chandler v. Miller, 520 U.S. 305, 117 S.Ct. 1295.

B. RULE-MAKING AUTHORITY:

The bill maintains the Agency for Health Care Administration's authority to adopt rules regarding drug-testing laboratories and the procedures governing how drug tests are conducted.

This bill grants the Division of Workers' Compensation authority to adopt rules regarding educational requirements that must be provided by employers as an element of a drug-free workplace.

It grants the Department of Labor and Employment Security authority to adopt rules necessary to implement the provisions of this act.

C. OTHER COMMENTS:

Department of Insurance

The Department of Insurance has concerns with the change that the bill makes to s. 627.0915, F.S. The bill amends this section to grant a 10% discount to employers that maintain a drug-free workplace pursuant to the rules adopted by the Division of Workers' Compensation or implement a safety program approved by the Division of Safety. It is unclear if this discount is intended by the sponsor to only be applicable to employers who maintain a drug-free workplace. As a note, the current discount is 5% for drug-free workplaces and 2% for safety programs.

The department also has concerns with the nature of the discount. There is no actuarial basis that indicates that the number of workers' compensation claims will be reduced as a result of increased participation by employers in the drug-free workplace program. If there is no actuarial basis for the discount then it is simply a subsidy paid for by higher rates assessed against those employers who do not comply with the drug-free workplace standards in this bill.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON HEALTH CARE LICENSING & REGULATION:

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