

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government → This bill authorizes the Department of Corrections to conduct reasonable suspicion drug testing of employees for the illegal use of steroids.

B. EFFECT OF PROPOSED CHANGES:

Reasonable Suspicion Drug Testing

Florida's Drug-Free Workplace Act¹ (Act) authorizes all state agencies to conduct *reasonable suspicion* testing for use of specifically listed drugs. The Act defines reasonable suspicion drug testing, in part, as drug testing based on a belief that an employee is using or has used drugs in violation of the employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience.² The Act states that, among other things, facts and inferences may be based upon:

- Observable phenomena while at work, such as direct observation of drug use or of the physical symptoms or manifestations of being under the influence of a drug.
- Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.
- A report of drug use, provided by a reliable and credible source, which has been independently corroborated.
- Evidence that an individual has tampered with a drug test during employment with the current employer.
- Information that an employee has caused, or contributed to, an accident while at work.
- Evidence that an employee has used, possessed, sold, solicited, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

Currently, the definition of "drugs" contained in the Drug-Free Workplace Act does not include steroids. Thus, state agencies are precluded from testing employees for steroids through *reasonable suspicion* drug testing under the Act.

Random Drug Testing

Section 944.474, F.S., prohibits Department of Corrections (DOC) employees from testing positive for illegal use of controlled substances and authorizes DOC to develop a program for the *random* drug testing of all employees. DOC defines "random drug testing" as "a drug test conducted based on a computer generated random sampling in positions identified as being subject to random testing, administered for purposes of determining the presence of drugs or their metabolites."³

The term "controlled substances" is defined in s. 893.02(4), F.S., as "any substance named or described in Schedules I-V of s. 893.03, F.S." Because Schedules I-V of s. 893.03, F.S., include steroids, DOC is currently authorized to test employees for steroids through *random* drug testing.

¹ s. 112.0455, F.S.

² *Id.* Additionally, the Act provides that reasonable suspicion drug testing shall not be required except upon the recommendation of a supervisor who is at least one level of supervision higher than the immediate supervisor of the employee in question.

³ Rule 33-208.403, F.A.C.

Effect of the Bill

This bill authorizes DOC to conduct *reasonable suspicion* drug testing of employees in safety sensitive and high risk positions for anabolic steroids⁴. The reasonable suspicion drug testing must be conducted in a manner consistent with s. 112.0455, F.S. (the Drug-free Workplace Act), but may also be conducted based on violent acts or violent behavior on or off duty.

C. SECTION DIRECTORY:

Section 1. Amends s. 944.474, F.S., authorizing the Department of Corrections to conduct reasonable suspicion drug testing of employees in safety sensitive or high risk positions for steroids.

Section 2. This act takes effect July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

DOC states that the fiscal impact of this bill will be "minimal," and that any costs will be absorbed in their existing budget.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

⁴ Anabolic steroids are defined in s. 893.03(3)(d), F.S.

2. Other:

From a constitutional standpoint, the primary issues raised by employee drug testing policies revolve around Fourth Amendment privacy concerns. In general, the courts have upheld reasonable suspicion drug testing policies based upon *on duty* drug use or impairment.⁵ Courts have been divided; however, on the issue of whether *off duty* drug use or impairment can form a legitimate basis for reasonable suspicion drug testing without falling afoul of the Fourth Amendment. The distinguishing factor seems to be whether the employee falls within the classification of a safety sensitive position.

For example, in *Benavidez v. Albuquerque*, 101 F. 3d 620 (10th Cir. 1996), the court indicated that “information which would lead a reasonable person to suspect non safety sensitive employees . . . of on-the job drug use, possession, or impairment” would provide a sufficient basis for reasonable suspicion drug testing. Additionally, in *American Federation of Government Employees v. Roberts*, 9 F.3d at 1468 (9th Cir. 1993), the court found that employees of a correctional institution were primary law enforcement officers and therefore could be subjected to reasonable suspicion drug testing based upon either on or off duty conduct. Moreover, in *American Federation of Government Employees v. Martin*, 969 F. 2d 788, 792-93 (9th Cir. 1992), the court held that reasonable suspicion of safety sensitive employees could be conducted based on off-duty drug use or impairment.

Conversely, in *National Treasury Employees v. Yeutter*, 918 F. 2d 968 (D.C. Cir. 1990), the court held that a reasonable suspicion drug testing program that tested non safety sensitive employees for off duty drug use was unconstitutional. Lastly, in *Rutherford v. Albuquerque*, 77 F. 3d 1258, 1263 (10th Cir. 1996), the court found drug testing unreasonable in part because it screened for off-duty drug use which was wholly unrelated to employer's asserted interest in on the job safety.

Because the bill limits reasonable suspicion drug testing to employees in safety sensitive and high risk positions, it would not appear to raise any Fourth Amendment concerns.

B. RULE-MAKING AUTHORITY:

This bill provides a general grant of rulemaking power to the Departments of Corrections to implement the bill's provisions (lines 38-39). The bill appears to give sufficient rule making authority that is appropriately limited.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Concerns have been identified relating to whether employees who are legally using controlled substances (e.g. they drug was prescribed to the employee, etc...) will be disciplined should they receive a positive drug test. The Drug-Free Workplace Act (applicable to *reasonable suspicion* drug testing) addresses this concern by requiring agencies with drug-testing programs to give employees being tested a copy of the agency's drug-testing policy, which must include procedures for employees to confidentially report the use of prescription or nonprescription medications both before and after being tested.⁶ Additionally, the drug-testing policy must include a statement that an employee who receives a positive confirmed drug test result may contest or explain the result to the employer within five working days after written notification of the positive test result.⁷ The bill directs DOC to develop a reasonable suspicion drug testing program and provides that such drug testing must be conducted *in manner consistent with the Act*. Thus, DOC would likely include the above-described protective measures, or something similar thereto, in their Rules.

⁵ See e.g., *Saavedra v. Albuquerque*, 73 F3d 1525 (10th Cir. 1996); *Garrison v. Department of Justice*, 72 F. 3d 1566 (Fed. Cir. 1995).

⁶ s. 112.0455, F.S.

⁷ *Id.*

The terms "safety sensitive positions" and "high risk positions" are not defined by the bill or elsewhere in statute. However, it is anticipated that DOC will define these terms in their rules.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES