

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: Criminal Justice Committee

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BILL: PCS/SB 1736

INTRODUCER: Criminal Justice Committee and Senator Wise

SUBJECT: Drug Testing/DOC

DATE: March 9, 2006

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cannon	CJ	<b>Pre-meeting</b>
2.	_____	_____	GO	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This legislation would permit the Department of Corrections to expand its current “random” drug testing program to include the more specific testing of employees whom the department reasonably suspects of using controlled substances. The only employees who would be allowed to be tested under this provision would be those in “safety sensitive and high risk positions.” Testing would only be permitted for anabolic steroids, the controlled substances which are listed in s. 893.03(3)(d), F.S. However, testing would be permitted for acts which occur while the employee is on or off duty and raise a reasonable suspicion of drug use.

This bill amends section 944.474, Florida Statutes.

## II. Present Situation:

### Reasonable Suspicion and Random Drug Testing

All state agencies are authorized to conduct “reasonable suspicion drug testing” for the specific drugs which are defined in s. 112.0455(5)(a), F.S. Anabolic steroids are not included in that list. Accordingly, no state agency may conduct a reasonable suspicion test for the use of steroids.

The Department of Corrections is currently authorized to randomly test all employees for the use of certain controlled substances.<sup>1</sup> Steroids are defined as a controlled substance in s. 893.03(3)(d), F.S. Therefore, the department is permitted to randomly test employees for the use of steroids. However, the department is not presently allowed to target or focus more specifically and test employees whose behavior raises the suspicion that they are under the influence of steroids.

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<sup>1</sup> Section 944.474, F.S.

**Background on Employee Drug Testing**

In 1989 the Legislature enacted the Drug-Free Workplace Act. One of the stated purposes of the act was to create drug-free workplaces for the protection of public employees and employers by using fair and reasonable drug testing methods. An additional stated purpose of the act was to provide employees with drug problems an opportunity to participate in employee assistance programs or alcohol and drug rehabilitation programs.<sup>2</sup>

The legislation provided that employers did not have a legal duty to request or require employees or applicants to undergo drug testing, however, when testing was to be done, it had to be done in compliance with standards established under the act.<sup>3</sup>

**Department of Corrections Testing**

In 1996 legislation was passed which directed the Department of Corrections to develop an employee wellness program.<sup>4</sup> The legislation noted that “under no circumstances shall employees of the department test positive for illegal use of controlled substances.” To insure that the department would be a drug-free work place, it was authorized to develop a program for random drug testing of its employees.

**DOC Task Force Findings and Recommendations**

The Task Force for Critical Incident Review was established in October 2005 by the Secretary of the Department of Corrections to review several incidents and issues facing the department. Among the findings which the task force studied was data related to employee arrests, particularly incidents involving staff alcohol or drug abuse. Over a period of four years, 67 employee arrests were reported for drug offenses. Employee arrests by year were reported as follows:

2002 – 19 arrests  
2003 – 15 arrests  
2004 – 18 arrests  
2005 – 15 arrests

As a result, the task force issued a recommendation that the statutes be amended to permit the “reasonable-suspicion” drug testing of employees who are suspected of using steroids.

**III. Effect of Proposed Changes:**

This legislation would authorize the Department of Corrections to develop a program to test employees whom the department reasonably suspects are using steroids. The random drug testing which is currently authorized does not allow the department to target those individuals whose behavior might be so erratic or violent as to suggest that they are using steroids or other drugs.

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<sup>2</sup> Section 112.0455(2), F. S.

<sup>3</sup> Section 112.0455(4), F.S.

<sup>4</sup> Section 944.474, F.S.

The legislation is limited in its scope: only employees who are in “safety sensitive and high risk positions” could be tested; testing would only be conducted for controlled substances listed in s. 893.03(3)(d), F.S., anabolic steroids.

The “reasonable suspicion drug testing” must be conducted in a manner that is consistent with s. 112.0455, F.S., the Drug-Free Workplace Act.<sup>5</sup> However, this legislation is broader than the provisions of that act and would permit reasonable suspicion testing that is based on violent acts or violent behavior which occurs while the employee is at work or off duty from work.

Finally, the proposed language gives the department the authority to adopt rules which it determines are necessary to administer this legislation.

#### **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:**

The drug testing of employees raises issues under the U.S. Constitution’s Fourth Amendment prohibition against unreasonable searches and seizures. The courts have generally upheld drug testing policies based upon reasonable suspicion for on duty drug use or impairment. The courts have been divided, however, on the issue of whether off duty drug use or impairment constitutes a legitimate basis for reasonable suspicion drug testing. The distinguishing factor in these cases is whether the employee’s job falls within a classification that is a safety sensitive position. Several federal decisions have held that

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<sup>5</sup> Reasonable suspicion testing is defined in the act as being based on a belief that an employee is using or has used drugs and that belief is “drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience.” This type of drug testing was only to be required upon the recommendation of a supervisor who is at least one level of supervision higher than the immediate supervisor of the employee in question. The facts and inferences could be based upon:

- Observable phenomena such as a direct observation of the employee using drugs or the symptoms or manifestations of someone being under the influence of drugs.
- Abnormal conduct or erratic behavior while at work or a significant deterioration in the employee’s work performance.
- Report of drug use provided by a reliable and credible source that is independently corroborated.
- Evidence of tampering with a drug test while employed with the current employer.
- Information that an employee has caused or contributed to an accident at work.
- Evidence that the employee has used, possessed, sold, solicited, or transferred drugs while working or on the employer’s premises or while operating the employer’s vehicle, machinery, or equipment.

reasonable suspicion testing of safety sensitive employees could be conducted based upon off-duty drug use or impairment.<sup>6</sup>

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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<sup>6</sup> See *American Federation of Government Employees v. Martin*, 969 F.2d 788 (9th Cir. 1992), *American Federation of Government Employees v. Roberts*, 9 F.3d 1464 (9th Cir. 1993), and *American Federation of Government Employees v. Barr*, 794 F. Supp 1466 (ND Cal 1992).

## **VIII. Summary of Amendments:**

None.

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