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HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
HEALTH PROMOTION
ANALYSIS

BILL #: HB 329

RELATING TO: Drug-Free Legislators

SPONSOR(S): Representative Baxley

TIED BILL(S):

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

(1) RULES, ETHICS, & ELECTIONS (PRC) YEAS 12 NAYS 2
(2) HEALTH PROMOTION
(3) PROCEDURAL & REDISTRICTING COUNCIL
(4)
(5)

I. SUMMARY:

HB 329 provides legislative intent that members of the Legislature should not expect more of the citizens of Florida under the drug-free workplace program than the Legislature expects of its own membership and that the Legislature will function as a drug-free workplace. To that end, the bill provides that the President of the Senate and the Speaker of the House of Representatives shall request that each member of their respective house submit to drug testing. The bill provides that a member may make the results of such screening available for public inspection and that any member who tests positive may be referred for treatment.

While the bill does not appear to have a significant fiscal impact on state or local governments, there will be costs associated with implementation of a drug-free workplace program.

The Committee on Rules, Ethics, & Elections adopted one amendment to HB 329. The amendment is traveling with the bill. [See, Section VI. of the analysis for an explanation of the amendment].

The act shall take effect upon becoming a law.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No [x]	N/A []
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No [x]	N/A []
4.	Personal Responsibility	Yes [x]	No []	N/A []
5.	Family Empowerment	Yes []	No []	N/A [x]

HB 329 provides that the President of the Senate and the Speaker of the House of Representatives *shall* request that each member submit to drug testing. It is a rule of statutory construction that the power of a future legislature cannot be limited by the acts of a present or prior legislature. To the extent the bill is an attempt to bind future Legislatures, it does not support the principle of "less government."

The bill, as filed, *mandates* that the President of the Senate and the Speaker of the House of Representatives *request* each member to submit to drug testing. While the bill does not address the repercussions should an individual member refuse to submit to drug testing, to the extent that the practical impact would be that members feel compelled or forced to submit to drug testing, the bill does not support the principle of individual freedom.

[**Note:** The bill, as amended, *mandates* that the President of the Senate and the Speaker of the House of Representatives *make available* to each member of their respective houses a drug test. Members may make their screening results available for public inspection. Members who test positive may be referred by the President of the Senate or the Speaker of the House of Representatives, respectively, for confidential medical consultation or treatment.]

B. PRESENT SITUATION:

Drug Testing in the Workplace

Drug testing is the analysis of body fluids (and hair, to a much lesser extent) to determine whether a person is using illegal drugs. Such tests are widely used in the workplace, in the military, and in criminal justice and drug treatment programs. The most common tests are for: alcohol, marijuana, cocaine, opiates, barbiturates, amphetamines, and benodiazapines. Modern drug testing employs various types of biochemistry techniques. In general, the typical procedure requires sending a urine sample to a laboratory for testing. The initial test is called an *immunoassay*. If the result is positive, a confirmation test, called a *gas chromatography/mass spectrometry*, is used to confirm the results.

Widespread testing of employees using urinalysis began in the mid-eighties, during the start of the "War on Drugs." In March 1986, President Ronald Reagan issued an executive order requiring random urinalysis of federal employees for drug testing. The practice was also required for companies wishing to receive federal grants. By the late eighties, it was common usuage for large and mid-size companies. [http://www.speakout.com/Issues/Briefs/1303/]

U.S. Supreme Court

The U.S. Supreme Court has sustained drug testing programs in various types of situations in examining the constitutionality of these programs under the Fourth Amendment to the U.S. Constitution. The Fourth Amendment protects "[t]the right of people to be secure…against unreasonable searches and seizures…" [U.S. Const. Art. IV] While searches, in general, have been held to be "per se" (inherently or "on its face") unreasonable when conducted without a warrant, the court has carved out some exceptions for "special needs." The special needs exceptions occur when the normal need and process for law enforcement make warrant and probable cause requirements impracticable. [*New Jersey v. T.L.O.*, 469 U.S. 325, 351, (1985)] The U.S. Supreme Court has recognized that a mandatory random drug testing scheme fits within a "special need" of the government if they contain stipulations required by the Court to be "reasonable."

In 1997, the Louisiana Legislature adopted a series of statutes (the program) to allow the state to require the State Board of Ethics (the board) to implement random drug testing of elected officials on January 1, 1998, or whenever funds were allocated. The program required selected elected officials to submit to drug screening at a laboratory approved by the board. The board was required to treat the results as confidential communications available strictly for use "in a proceeding, hearing, or civil litigation for violation of this section." Officials who fail the test would be required to take a second test. The law was challenged in federal court. A federal judge struck down the testing program as constitutional, and the 5th U.S. Circuit Court of Appeal upheld that ruling. The U.S. Supreme Court, acting without comment, rejected the appeal by the Louisiana officials. [*O'Neill v. Louisiana*, 61 F.Supp.2d 485, 197 F.3d 1169, *aff'd, 120 S.Ct.* 2740, *cert. denied*]

According to the lower court:

> [T]he defendants have failed to carry their burden in demonstrating that "special needs" beyond that normal needs of law enforcement exist, such that an exception to the rule requiring individualized suspicion is warranted.

[61 F.Supp.2d 485, 497]

[NOTE: See Section V. A., CONSTITUTIONAL ISSUES, for additional background information.]

Florida State Constitution

In 1968, the State Constitution was revised to require that a code of ethics for all state employees and non-judicial officers prohibiting conflict between public duty and private interests be prescribed by law. In 1976, by constitutional initiative, the "Sunshine Amendment" was adopted which provided additional constitutional guarantees concerning ethics in government. [See, s. 8., Art. II, Fla. Const.].

Florida Code of Ethics for Public Officers and Employees

The Code of Ethics for Public Officers and Employees (the Code) is found in Part III of Chapter 112, F.S. The Code is designed to promote the public interest and to maintain the respect of the people for their government. To protect against conflicts of interest, the Code establishes standards of conduct for elected officials and government employees. The ethics laws generally consist of two types of provisions, those prohibiting certain actions or conduct, and those requiring that certain disclosures be made to the public.

Rules of the Florida House of Representatives and the Florida Senate (2000-2001)

Rules 15.1 through 15.8 of the Rules of the Florida House of Representatives (2000-2002) constitute the House Code of Conduct.

Rule 15.1 – Legislative Ethics and Official Conduct states:

> Legislative office is a trust to be performed with integrity in the public interest. A Member is respectful of the confidence placed in the Member by the other Members and by the people. By personal example and by admonition to colleagues whose behavior may threaten the honor of the lawmaking body, the Member shall watchfully guard the responsibility of office and the responsibilities and duties place on the Member by the house. To this end, each Member shall be accountable to the House for violations of this Rule or any provision of the House Code of Conduct contained in Rules 15.1-15.8.

Rule 15.2 – The Integrity of the House states:

> A Member shall respect and comply with the law and shall perform at all times in a manner that promotes public confidence in the integrity and independence of the House and of the Legislature. Each Member shall perform at all times in a manner that promotes a professional environment in the House, which shall be free from unlawful employment discrimination.

Rule 1.35 of the Rules and Manual of the Florida Senate (2000-2002), states:

> Every Senator shall conduct himself or herself to justify the confidence placed in him or her by the people and, by personal example and admonition to colleagues, shall maintain the integrity and responsibility of his or her office.

Presently, there is no official House or Senate rule relating to drug testing of members or staff, nor has a drug-free workplace program been adopted for the Legislature.

Section 112.0455, F.S., "Drug-Free Workplace Act"

Section 112.0455, F.S., is known as the "Drug-Free Workplace Act" (the Act). The purpose of the Act is set forth in statute:

- To promote the goal of drug-free workplaces within government through fair and reasonable drug-testing methods for the protection of public employees and employers.
- To encourage employers to provide employees who have drug use problems with an opportunity to participate in an employee assistance program or an alcohol and drug rehabilitation program.
- To provide for confidentiality of testing results.

Employers do not have a legal duty under the Act to request an employee or job applicant to undergo drug testing, and no testing of employees may take effect until local drug abuse assistance programs have been identified. [s. 112.0455(4), F.S.] The Act provides that employers with no drug-testing program shall ensure that at least 60 days elapse between a general one-time notice to all employees that a drug-testing program is being implemented and the beginning of actual drug testing. [s. 112.0455(6)(a), F.S.] Under the Act, employers are authorized, but not required, to

conduct certain types of drug tests: (1) job applicant testing, (2) reasonable suspicion drug testing, (3) routine fitness for duty drug testing, and (4) follow up drug testing. [s. 112.0455(7), F.S.]

The Act provides detailed procedures that must be followed during specimen collection and testing for drugs to ensure maximum employee protection. [s. 112.0455(8), F.S.] In turn, the Act protects an employer who discharges, disciplines, or refuses to hire an individual in compliance with the provisions set forth under the Act. [s. 112.0455(9), F.S.] Unless otherwise provided for under the Act, all information, interviews, reports, statements, memoranda, and drug result tests received or produced as a result of a drug-testing program are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

Of particular note in the "Drug Free Workplace Act" is paragraph (g) of subsection (13) of s. 112.0455, F.S., which authorizes the President of the Senate and the Speaker of the House of Representatives to adopt rules, policies, or procedures for the employees and members of the legislative branch implementing this section.

Chapter 440, F.S., "Workers' Compensation Law"

Chapter 440, F.S., is the "Workers' Compensation Law." The Division of Workers' Compensation administers the Workers' Compensation Law in a manner that facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments. [s. 440.015, F.S.] Section 440.101(1), F.S., sets forth the Legislative intent to promote drug-free workplaces:

> It is the intent of the Legislature to promote drug-free workplaces in order that employers in the state be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees. It is further the intent of the Legislature that drug abuse be discouraged and that employees who choose to engage in drug abuse face the risk of unemployment and the forfeiture of workers' compensation benefits.

Section 440.102, F.S., are the provisions that apply to a drug-free workplace program implemented pursuant to law or to rules adopted by the Agency for Health Care Administration. Under the workers' compensation drug-free workplace program, employers are required to conduct the following types of drug tests: (1) job applicant drug testing, (2) reasonable-suspicion drug testing, (3) routine fitness-for-duty drug testing, and (4) follow up drug testing. [s. 440.102(4), F.S.] As with the "Drug-Free Workplace Act" under s. 112.0455, F.S., the drug-free workplace program under s. 440.102, F.S., sets forth specific procedures that must be followed, and specific protections that are provided to both employers and employees.

C. EFFECT OF PROPOSED CHANGES:

HB 329 declares that the Legislature will function as a drug-free workplace. Further, the bill requires the President of the Senate and the Speaker of the House of Representatives to request each member of their respective house to submit to drug testing. A member is then given the option of making the results available for public inspection. Any member testing positive may be referred for treatment. Finally, the bill provides that such drug testing and treatment shall be as provided in s. 112.0455, F.S., (the Drug-Free Workplace Act), or s. 440.102, F.S., (the Drug-Free Workplace Program under Workers' Compensation).

It is a rule of statutory construction that the power of a future legislature cannot be limited by the acts of a present or prior legislature.

HB 329 raises right to privacy constitutional issues, which are discussed under the section of the bill analysis entitled, "CONSTITUTIONAL ISSUES."

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

There will be costs associated with implementation of a drug-free workplace program.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require a city or county to spend funds or to take any action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the revenue raising authority of any city or county.

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

The bill does not reduce the amount of state tax shared with any county or municipality.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

The Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution protect substantive and procedural due process. Substantive due process is a doctrine that "requires legislation to be fair and reasonable in content as well as application." BLACKS LAW DICTIONARY, 1429 (7th ed. 1990). Substantive due process guarantees that laws will be reasonable, not arbitrary or irrational. If a law infringes upon a fundamental right, the courts apply a strict scrutiny analysis: the state must establish that it has compelling interest justifying the law and that the law is necessary to further a governmental purpose and that the law is narrowly tailored to effectuate the purpose. Only four rights are considered "fundamental" under substantive due process analysis: (1) the right to travel, (2) the right of privacy, 3) the right to vote, and (4) First Amendment rights.

Article I, Section 23 of the Florida Constitution states, in pertinent part, "[e]very 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." Florida's right to privacy has been construed by the courts as being stronger than the corresponding federal right. [See generally, *Von Eiff v. Azicri*, 720 So.2d 510 (Fla. 1998); *Shaktman v. State*, 553 So.2d 148 (Fla. 1989); *Division of Pari-Mutuel Wagering v. Winfield*, 477 So. 2d 544 (Fla. 1985)]. A government intrusion into individual privacy rights is analyzed under a four-part analytical framework. Any person wishing to assert the right to privacy must show: (1) state action, and (2) a reasonable expectation of privacy. Once these two elements have been established, the person's right to privacy rises to the level of a fundamental right. To justify the intrusion, the government must show: (1) that it has a compelling state interest, and (2) that it has used the least intrusive means to further that interest. [See generally, *Florida Board of Bar Examiners Re: Applicant*, 443 So.2d 71 (Fla. 1984); *Byron, Harless, Schaffer, Reid and Associates, Inc., v. State ex rel. Schellenberg*, 360 So.2d 83 (Fla. 1978); and *In re T.W., a Minor*, 551 So. 2d 1186 (Fla. 1989)] In general, Florida's right to privacy protects two different types of interests: (1) protection of personal decisions, and (2) protection from disclosure of private information.

The United States Supreme Court has sustained drug-testing programs for student athletes, customs employees, and railway employees. [See, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995)(random drug testing of students who participate in interscholastic sports); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989)(drug tests for United States Customs Service employees who seek transfer or promotion to certain positions); and *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (drug and alcohol tests for railway employees involved in train accidents and for those who violate particular safety rules)]

In 1990, the Georgia Legislature passed a law that conditioned candidacy for state office on a drug test. The law required candidates for designated state offices to certify that they had taken a drug test and that the test result was negative. Under the Georgia statute, to qualify for a place on a ballot, a candidate had to present a certificate from a state approved laboratory, reporting that the candidate submitted to a urinalysis drug test within 30 days prior to qualifying for nomination or elections, and that the results were negative. The Libertarian Party nominees in 1994 for state offices subject to the drug testing requirements sued the state, alleging that the drug testing violated their rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution. A divided Eleventh Circuit panel upheld the law. [I*Chandler v. Miller*, 73 F.3d 1543 (11th Cir. 1996)] The United States Supreme Court reversed the decision. [*Chandler v. Miller*, 520 U.S. 305 (1997)]

It was an uncontested point that Georgia's drug testing requirement, imposed by law and enforced by state officials, effectuated a search within the meaning of the Fourth and Fourteenth Amendments. As the Court had explained in the *Skinner* case, "government ordered collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable." [*Skinner*, 489 U.S., at 617] To be considered reasonable under the Fourth Amendment, a search must ordinarily be based on individualized suspicion of wrongdoing. [See, *Vernonia*, 515 U.S. 646 (1995)] Nonetheless, particularized exceptions to the main rule are sometimes warranted based on "special needs, beyond the normal need for law enforcement." [See, *Skinner*, 489 U.S., at 619)] When "special needs" are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context specific inquiry, examining closely the competing private and public interests advanced by the parties. [See, *Skinner*, 489 U.S., at 668 and *Von Raab*, 489 U.S., at 665-666)]

The state's defense of the statute at issue in *Chandler v. Miller* was that unlawful drug use was not compatible with holding high state office. The Court noted, however, that Georgia had asserted no evidence of a drug problem among the State's elected officials, that those officials typically did not perform high risk, safety sensitive tasks, and that the required certification immediately aided no interdiction effort. As stated by the Court, "[t]he need revealed, in short, is symbolic, not 'special,' as that term draws meaning from our case law . . . [and] [h]owever well meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake. The Fourth Amendment shields society against that state action." [*Chandler v. Miller*, 520 U.S. 305 (1997)]

Unlike the Georgia statute at issue in *Chandler v. Miller*, the only mandatory act provided for in HB 329 is the request by the presiding officers of the Legislature to the individual membership to submit to drug testing. The bill does not provide any indication of what would happen should a particular member refuse to take a drug test. HB 329 gives an individual member the *option* of publicly disclosing the results of the drug test. While the distinctions between the Georgia statute and HB 329 are significant, the *Chandler* case does offer guidance with respect to the constitutional analysis of drug testing laws.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

This bill does not have a Senate companion.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Amendment No. 1 was offered by Representative Baxley and adopted unanimously by the Committee on Rules, Ethics, & Elections on March 26, 2001. The amendment provides that the President of the Senate and the Speaker of the House of Representatives shall *make available* a drug test to each member of their respective houses. The amendment provides that any member who tests positive may be referred by the President of the Senate or the Speaker of the House of Representatives for confidential medical consultation or treatment. The amendment is traveling with the bill.

VII. SIGNATURES:

COMMITTEE ON RULES, ETHICS, & ELECTIONS (PRC):

Prepared by:	Staff Director:
Dawn K. Roberts, Esq.	R. Philip Twogood

AS REVISED BY THE COMMITTEE ON HEALTH PROMOTION:

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