HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 1205 Drug-Free Workplace Act
SPONSOR(S): State Affairs Committee, Appropriations Committee, Government Operations Subcommittee, Smith
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1358

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	9 Y, 4 N, As CS	Naf	Williamson
2) Appropriations Committee	15 Y, 8 N, As CS	Delaney	Leznoff
3) State Affairs Committee	9 Y, 6 N, As CS	Naf	Hamby

SUMMARY ANALYSIS

Current law provides notice and procedural requirements for the drug testing of both public and private employees. It also provides requirements for the discipline, treatment, and continued employment of a state employee who receives a positive drug test result.

This bill expands the authorization of state agencies to drug test employees to allow for random drug testing of all employees at specified intervals. It limits the number of employees tested to no more than 10 percent of each agency's workforce every three months.

The bill also revises requirements for the discipline, treatment, and continued employment of a state employee who receives a positive drug test result. In part, such revisions include authorization for a state agency to terminate the employment of any employee who receives a first-time positive drug test result.

The bill provides for the blanket drug testing of all state agency job applicants, regardless of the duties of the position.

The bill provides that any drug test conducted under the Drug-Free Workplace Act must be paid for by each agency's appropriation.

In addition, the bill revises the categories of public job applicants that may be drug tested. It also expands the categories of employers that may qualify for certain insurance discounts due to maintenance of a drug-free workplace program.

The bill amends language pertaining to the authorization for the Department of Corrections to conduct employee drug testing to conform to the expanded drug testing authorization for all state job applicants.

The bill raises important constitutional concerns related to the permissibility of suspicionless drug testing as a condition of state employment.

The bill provides an effective date of July 1, 2012.

The bill has an indeterminate fiscal impact on state and local governments, as it is permissive. In addition, the bill requires the costs of any drug test administered under this act to be paid from each agency's appropriation. *See* Fiscal Comments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

EFFECT OF PROPOSED CHANGES

Drug-Free Workplace Act

The bill amends the Drug-Free Workplace Act[1] to authorize state agencies to:

- Drug test all job applicants, instead of only those applying for a special risk or safety-sensitive position.
- Conduct random drug testing of no more than 10 percent of an agency's employees no more often than once every three months. The sample of the agency's employees must be computer-generated by an independent third party.

The bill relocates and revises requirements for the discipline, treatment, and continued employment of an employee who receives a positive drug test result. It makes the following substantive changes to such requirements:

- Removes a provision prohibiting a state agency from discharging, disciplining, or discriminating against an employee (other than a special-risk employee[2]) on the sole basis of the employee's first positive confirmed drug test under certain conditions.
- Consolidates the provisions relating to continued employment of employees in special risk or safety-sensitive positions.[3] It removes the current definition for "safety-sensitive position" and instead amends the provisions related to employees in such positions to prescribe duties an employee would be deemed unable to safely and effectively perform while participating in an employee assistance program. Such duties are those that require an employee to:
    - Carry a firearm;
    - Work closely with an employee who carries a firearm;
    - Perform life-threatening procedures;
    - Work with heavy or dangerous machinery;
    - Work as a safety inspector;
    - Work with children;
    - Work with detainees in the correctional system;
    - Work with confidential information or documents pertaining to criminal investigations;
    - Work with controlled substances;
    - Hold a position subject to s. 110.1127, F.S.;[4] or
    - Hold a position in which a momentary lapse in attention could result in injury or death to another person.[5]

The bill requires any drug test conducted under the Drug-Free Workplace Act to be paid for within an agency's appropriation.

Drug-Free Workplace Program Requirements for Private and Public Employers

The bill amends provisions governing drug-free workplace program requirements.

[1] *See* s. 112.0455, F.S.
[2] A special-risk employee is one who is required as a condition of employment to be certified under chapter 633, F.S. (Fire Prevention Control) or chapter 943, F.S. (Department of Law Enforcement). Section 112.0455(5)(n), F.S.
[3] A safety-sensitive position is any position, including a supervisory or management position, in which drug impairment would constitute an immediate and direct threat to public health and safety. Section 112.0455(5)(m), F.S.
[4] Section 110.1127, F.S., requires security checks for employees in specified positions of special responsibility or sensitive location.
[5] These duties are substantially similar to those included in the current definition of "safety-sensitive position" for the drug-free workplace program requirements of s. 440.102, F.S.

The bill removes the current definition for "safety-sensitive position" and replaces the term with "mandatory-testing position." It defines "mandatory-testing position" to mean "with respect to a public employer, a job assignment that requires the employee to" engage in any of the activities which an employee would be deemed unable to safely and effectively perform while participating in an employee assistance program under the Drug-Free Workplace Act.

The bill amends the provision qualifying an employer for discounts provided under s. 627.0915, F.S.,[6] if it conforms to the standards established in the section governing drug-free workplace programs. It provides that an employer may also receive such discounts if it maintains a drug-free workplace program that is broader in scope than that provided for by the standards established in the section.

Department of Corrections Employee and Job Applicant Drug Testing

The bill provides that the Department of Corrections may drug test all job applicants, in addition to its current authority to randomly drug test all employees.

BACKGROUND

Statutory Provisions Governing Employee Drug Testing

Drug-Free Workplace Act

The Drug-Free Workplace Act (act) governs the drug testing of state employees. The purpose of the act is to:

- Promote the goal of drug-free workplaces within government through fair and reasonable drug-testing methods.
- 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.
- Provide for confidentiality of testing results.[7]

The act authorizes, but does not require, state agencies to drug test:

- A job applicant for a special-risk[8] or safety-sensitive position.[9]
- An employee whom the employer has reasonable suspicion to believe is using or has used drugs.[10]
- An employee as part of a routinely scheduled fitness-for-duty medical examination that is part of the employer's established policy or that is scheduled routinely for all members of an employment classification or group.
- An employee who in the course of employment enters an employee assistance program for drug-related problems, or an alcohol and drug rehabilitation program, as a follow-up for a specified time frame.[11]

The act provides requirements for the discipline, treatment, and continued employment of an employee who receives a positive drug test result.[12] A state agency may not discharge, discipline, or discriminate against an employee (other than a special-risk employee) on the sole basis of the employee's first positive confirmed drug test, if certain conditions are met.[13] If an employee who receives a positive

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[6] Section 627.0915, F.S., authorizes discounts for workers' compensation and employer's liability insurance if an employer meets specified drug-free workplace program or safety program requirements.

[7] *See* s. 112.0455(2), F.S.

[8] *See* note 2.

[9] *See* note 3.

[10] Such "reasonable suspicion drug testing" must be based upon 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. It may 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. *See* s. 112.0455(5)(j), F.S.

[11] *See* s. 112.0455(7), F.S.

[12] *See* s. 112.0455(8), F.S.

[13] The public employer may only discharge, discipline, or discriminate against an employee under such circumstances if the employer has first given the employee the opportunity to participate in an employee assistance program or an alcohol and drug rehabilitation

drug test result is allowed to continue his or her employment, such employee must complete an employee assistance program or an alcohol and drug rehabilitation program. If such employee is in a special-risk or safety-sensitive position, he or she must be placed in a non-safety-sensitive or special risk position while participating in such program. If no such position is available, the employee must be placed on leave status while participating in the program, but may use any accumulated leave credits before being placed on leave without pay.[14]

Drug-Free Workplace Program Requirements for Private and Public Employers
In addition to the Drug-Free Workplace Act, current law provides legislative intent to promote drug-free workplaces and sets out notice and procedural requirements for employee drug testing.[15] These requirements apply to both private and public employers. An employer is not required to request an employee or job applicant to undergo drug testing.[16]

The only job applicants a public employer may drug test are those for a special-risk[17] or a safety-sensitive position.[18]

If an employer implements drug testing that conforms to the statutory standards and procedures and to applicable rules, such employer is eligible for workers' compensation and employer's liability insurance discounts.[19]

Department of Corrections Employee Drug Testing
Current law authorizes the Department of Corrections to randomly drug test all employees.[20]

Office of the Governor Executive Order Number 11-58

Executive Order Number 11-58 (order), signed by the Governor on March 22, 2011, requires pre-employment and random drug testing for state employees.[21]

A representative of state employees sued the Governor, alleging that the drug-testing policies required by the order constitute a suspicionless search without a special need in violation of the Fourth Amendment of the United States Constitution.[22] Both parties have requested summary judgment and are awaiting a decision by a federal district judge.[23]

Challenges under the United States Constitution

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program (at the employee's own expense or pursuant to coverage under a health insurance plan), and: the employee has either refused to participate in or has failed to complete such program; or the employee has failed or refused to sign a written consent form allowing the employer to obtain information regarding the progress and successful completion of such program. *See* s. 112.0455(8)(n)1., F.S.

[14] *See* ss. 112.0455(8)(n)2.-3., F.S.

[15] *See* ss. 440.101 and 440.102, F.S.

[16] *See* s. 440.102(2), F.S.

[17] "Special-risk position" means, with respect to a public employer, a position that is required to be filled by a person who is certified under chapter 633, F.S. (Fire Prevention Control) or chapter 943, F.S. (Department of Law Enforcement). Section 440.102(1)(p), F.S.

[18] "Safety-sensitive position" means, with respect to a public employer, a position in which a drug impairment constitutes an immediate and direct threat to public health or safety, such as a position that requires the employee to carry a firearm, perform life-threatening procedures, work with confidential information or documents pertaining to criminal investigations, or work with controlled substances; a position subject to s. 110.1127; or a position in which a momentary lapse in attention could result in injury or death to another person. Section 440.102(1)(o), F.S.

[19] Id.

[20] *See* s. 944.474(2), F.S.

[21] Available online at http://www.flgov.com/wp-content/uploads/orders/2011/11-58-testing.pdf (last visited January 21, 2012).

[22] *See* "Complaint," American Federation of State, County and Municipal Employees Council 79, and Richard Flamm, v. Rick Scott, Case No. 1:11-cv-21976-UU (S.D. Fla. 2011).

[23] *See* "Plaintiff's Motion for Summary Judgment" and "Defendant's Motion for Summary Judgment and Incorporated Memorandum of Law," American Federation of State, County and Municipal Employees Council 79, and Richard Flamm, v. Rick Scott, Case No. 1:11-cv-21976-UU (S.D. Fla. 2011).

The United States Supreme Court has ruled in four situations that suspicionless drug testing is constitutional and does not violate the Fourth Amendment, which protects an individual's rights against unreasonable search and seizure.[24] These situations include suspicionless drug testing of:

- Students in extracurricular activities;[25]
- Student athletes;[26]
- Certain Customs employees; and[27]
- Railroad employees after major accidents.[28]

In these cases, the court focused on the special need of the government, the unique situation involved (school setting, drug enforcement, and major train accidents), and public safety.

The United States Supreme Court has held one suspicionless drug test unconstitutional. In Chandler v. Miller, the state of Georgia required all candidates for designated state offices to certify that they had taken a drug test and that the result was negative in order to run for state office.[29] In ruling the drug testing unconstitutional, the court held that,

> Where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'…But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search.[30]

Federal district courts in Florida have ruled on the constitutionality of random drug testing of public employees and of blanket drug testing of job applicants with a public employer, holding that:

- A state agency's random drug testing policy was unconstitutional as applied to a strategic planning analyst because the employee did not present a concrete risk of real harm;[31] and
- A city's suspicionless drug testing of all new applicants as a condition of employment was unconstitutional because the city produced no concrete evidence or history of drug use among its employees and failed to specifically identify any governmental interest sufficiently compelling to justify testing all job applicants.[32]

An issue that has not been ruled upon in the context of suspicionless public employee and job applicant drug testing in federal courts with jurisdiction in Florida is that of an employee's or applicant's consent to the drug test. Some appellate courts have considered consent of the employee when holding that a physical search of a public employee or his or her property is not an unconstitutional search.[33] In addition, the Third Circuit has held that a public job applicant's consent to a drug test satisfied the Fourth Amendment's reasonableness requirement.[34] In the same ruling, however, the Third Circuit

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[24] A concurring opinion in Katz v. United States, 389 U.S. 347, 360-361 (1967), set out the "reasonable expectation of privacy test" – when a person manifests a subjective expectation of privacy that society accepts as reasonable, that person has a "reasonable expectation of privacy" protected by the Fourth Amendment. Therefore, if there is no reasonable expectation of privacy, no Fourth Amendment violation can occur.
[25] Board of Education v. Earls, 536 U.S. 822 (2002) (Drug testing students in extracurricular activities).
[26] Vernonia School District v. Acton, 515 U.S. 646 (1995) (Drug testing student athletes).
[27] National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (Testing of certain Customs employees).
[28] Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) (Testing of railroad employees after major accidents).
[29] Chandler v. Miller, 520 U.S. 305 (1997).
[30] Id. at 323.
[31] Wenzel v. Bankhead, 351 F.Supp.2d 1316 (N.D. Fla. 2004).
[32] Baron v. Hollywood, 93 F.Supp.2d 1337 (S.D. Fla. 2000).
[33] For example, *see* United States v. Sihler, 562 F.2d 349, 350 (5th Cir. 1977) (holding, in part, that a search of a prison guard did not violate the Fourth Amendment because the guard had "voluntarily accepted and continued an employment which subjected him to search on a routine basis") and United States v. Esser, 284 Fed. Appx. 757, 758-759 (11th Cir. 2008) (citing Sihler and holding that in light of a post office regulation that purses were subject to inspection, a postal employee consented to the search of her purse "by virtue of her voluntary employment and her decision to bring her purse on postal property").
[34] Kerns v. Chalfont-New Britain Twp. Joint Sewage Auth., 263 F.3d 61, 65-55 (3d Cir. 2001).

cited a prior case, saying that it "is the law of [the Third Circuit] that 'silent submission' to a drug test 'on pain of dismissal from employment' does not constitute consent."[35]

Other issues that may be arguable are whether the suspicionless drug testing of public employees or job applicants contravenes reasonable expectations of privacy and whether the government has a special need for such drug testing that outweighs the privacy interests of such employees and applicants.[36]

B. SECTION DIRECTORY:

Section 1 amends s. 112.0455, F.S., relating to the Drug-Free Workplace Act for state agencies.

Section 2 amends s. 440.102, F.S., relating to drug-free workplace program requirements for public and private employers.

Section 3 amends s. 944.474, F.S., relating to the authority of the Department of Corrections to drug test employees and job applicants.

Section 4 provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   See FISCAL COMMENTS.

2. Expenditures:

   See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   See FISCAL COMMENTS.

2. Expenditures:

   See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill's extension of certain insurance discounts to employers with a broader drug-free workplace program than that set out in statute may result in an indeterminate reduction in expenditures of private employers.

D. FISCAL COMMENTS:

The bill authorizes no new revenue sources and existing revenues would not be increased. However, it is unclear whether a public employer that chooses to use the bill's expanded drug testing authorization would constitute an employer with the type of broader drug-free workplace program entitled to receive certain insurance discounts by the bill. If so, the bill's extension of certain insurance discounts to employers with a broader drug-free workplace program than that set out in statute may result in an indeterminate reduction in expenditures of local governmental entities.

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[35] Id. at 66. The cited case, Bolden v. SEPTA, 953 F.2d 807 (3d Cir. 1991), held in part that an employee's silent submission to drug testing required as a prerequisite to his return to work was not a voluntary consent to search (id. at 824).

[36] *See* documents cited in note 23.

The bill may result in an indeterminate increase in expenditures for state governmental entities if the entities choose to use the expanded drug testing authorization. If all agencies elected to impose the maximum amount of random drug tests, the estimated annual cost would be approximately $566 thousand in General Revenue and $1.3 million in trust funds (assuming $40 per test[37] and 118 thousand authorized state positions). However, it is unknown how many agencies will elect to conduct random drug tests and to what extent. In addition, the costs associated with state agencies elected to drug test applicants is indeterminate as it is unknown how many will elect to do so.

The expansion of the number of employees occupying "mandatory-testing" positions could result in indeterminate costs for public employers to the extent of their testing.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

United States Constitution
As discussed above, under certain circumstances the United States Supreme Court found suspicionless drug testing is constitutional and does not violate the Fourth Amendment.[38] In only one case has the United States Supreme Court found a suspicionless search unconstitutional.[39] Those cases did not address universal, suspicionless drug testing of all public job applicants and random drug testing of public employees. Courts in Florida addressing such issues have held that such testing is unconstitutional when applied universally or randomly without reasonable suspicion of drug use, but other issues not yet raised in such cases may be relevant. This bill authorizes universal, suspicionless drug testing.

Florida Constitution
The Florida Constitution guarantees every natural person's right to be let alone and free of governmental intrusion into his or her private life except as the Constitution otherwise provides (hereinafter "privacy clause").[40] Although the Florida Supreme Court has ruled that the privacy clause cannot be used in search and seizure matters,[41] it appears that there is an exception if the United States Supreme Court finds that the Fourth Amendment is inapplicable because the person seeking constitutional protection has no reasonable expectation of privacy. In such a situation, the privacy clause may apparently be used.[42] The right of the privacy clause has not been interpreted in the context of random drug testing of public employees and blanket drug testing of public job applicants.

The constitutional separation of powers doctrine[43] prevents the Legislature from delegating its constitutional duties.[44] Because legislative power involves the exercise of policy-related discretion

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[37] Source of cost was obtained by Appropriations Committee staff through a phone call to ARCpoint Labs on February 21, 2012.
[38] *See* note 24.
[39] *See* note 30.
[40] Article I, s. 23, Fla. Const.
[41] State v. Hume, 512 So.2d 185, 188 (Fla. 1987) (concluding that the privacy clause does not modify the applicability of the search and seizure provisions of the Florida Constitution).
[42] *See* Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544, 547-48 (Fla. 1985); and Shaktman v. State, 529 So.2d 711, 714-19 (Fla. Dist. Ct. App. 1988), *aff'd* 553 So.2d 148, 149 (Fla. 1989).
[43] Article II, s. 3, Fla. Const.

over the content of law,[45] any discretion given an agency to implement a law must be "pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program."[46] The bill authorizes the random drug testing of public employees, but does not provide guidelines for that authorization other than a requirement that it occur no more frequently than once every three months.

B. RULE-MAKING AUTHORITY:

The section of law containing the drug-free workplace program requirements amended by the bill includes rulemaking authority for the Agency for Health Care Administration (AHCA) for purposes of implementing the requirements, such as authority to drug test certain job applicants.[47] AHCA may need to amend any existing rules to incorporate changes made by the bill. It appears to have sufficient authority to do so.

As discussed above, the bill authorizes the random drug testing of public employees, but does not provide guidelines for that authorization other than a requirements that it be limited to no more than 10 percent of the agencies positions nor occur no more frequently than once every three months.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides that an employer may receive certain discounts if it has a drug-free workplace program that is broader in scope than the standards specified in statute.[48] However, it does not define "broader in scope." The Legislature may wish to clarify its meaning.

Current law provides that drug-free workplace program requirements are a mandatory topic of negotiations with any certified collective bargaining agent for nonfederal public sector employers that operate under a collective bargaining agreement.[49] In addition, if applicable, random drug testing must be specified in a collective bargaining agreement as negotiated by the appropriate certified bargaining agent before such testing is implemented.[50] The bill deletes the provision requiring random drug testing to be specified in an agreement before the testing is implemented. The Legislature may wish to clarify whether the content of that provision is included in the remaining collective bargaining rights.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 25, 2012, the Government Operations Subcommittee adopted two amendments and passed HB 1205 as a committee substitute. The amendments:

- Corrected the title of the bill to add notice that the bill revises the definition of "job applicant" in the Drug-Free Workplace Act; and
- Added references to alcohol and drug rehabilitation programs to the revised procedures for continued employment of certain employees to conform to other statutory provisions.

On February 21, 2012, the Appropriations Committee adopted an amendment and passed CS/HB 1205 as a committee substitute. The amendment provided:

- Any costs related to the implementation of drug testing for state employees under the act must be covered by an agency's current appropriation.
- Random drug testing is limited to no more than 10 percent of each agency's employees.
- The random drug testing sample must be developed by an independent third party.

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[44] *See* Florida State Bd. Of Architecture v. Wasserman, 377 So.2d 653 (Fla. 1979).
[45] *See* State ex rel. Taylor v. City of Tallahassee, 177 So. 719 (Fla. 1937).
[46] *See* Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978).
[47] *See* ss. 440.101(2) and 440.102(4)(c), F.S.
[48] Lines 491-495 of the bill.
[49] Section 440.102(13), F.S.
[50] Section 440.102(7)(g), F.S.

On February 24, 2012, the State Affairs Committee adopted two amendments and passed CS/CS/HB 1205 as a committee substitute. The amendments:

- Reinstate public employees' collective bargaining rights related to drug testing.
- Make a conforming language and cross-reference update.

This analysis is drafted to the committee substitute as passed by the State Affairs Committee.