

CHAPTER 2012-8

Committee Substitute for Committee Substitute for Committee Substitute for House Bill No. 1205

An act relating to drug-free workplaces; amending s. 112.0455, F.S.; revising the definition of the term “job applicant,” defining the term “random testing,” and removing the definition of the term “safety-sensitive position” for purposes of the Drug-Free Workplace Act; requiring drug testing to be conducted within each state agency’s appropriation; authorizing a state agency to conduct random drug testing every 3 months; providing testing selection requirements; removing provisions prohibiting a state agency from discharging or disciplining an employee under certain circumstances based on the employee’s first positive confirmed drug test; removing provisions limiting the circumstances under which an agency may discharge an employee in a special risk or safety-sensitive position; providing that an agency may discharge or discipline an employee following a first-time positive confirmed drug test result; authorizing an agency to refer an employee to an employee assistance program or an alcohol and drug rehabilitation program if the employee is not discharged; requiring participation in an employee assistance program or an alcohol and drug rehabilitation program at the employee’s own expense or at the expense of a health insurance plan; requiring the employer to determine if the employee is able to safely and effectively perform the job duties assigned to the employee while the employee is participating in the employee assistance program or alcohol and drug rehabilitation program; deeming that certain specified job activities cannot be performed safely and effectively while the employee is participating in the employee assistance program or alcohol and drug rehabilitation program; requiring the employer to transfer the employee to a job assignment that he or she can perform safely and effectively while the employee participates in the employee assistance program or alcohol and drug rehabilitation program; requiring the employer to place the employee on leave status while the employee is participating in an employee assistance program or an alcohol and drug rehabilitation program if such a position is unavailable; authorizing the employee to use accumulated leave credits before being placed on leave without pay; amending s. 440.102, F.S.; revising the definition of the term “job applicant” as it pertains to a public employer; removing the definition of the term “safety-sensitive position” and replacing it with the definition for the term “mandatory-testing position,” providing that an employer remains qualified for an insurer rate plan that discounts rates for workers’ compensation and employer’s liability insurance policies if the employer maintains a drug-free workplace program that is broader in scope than that provided for by the standards and procedures established in the act; authorizing a public employer, using an unbiased selection procedure, to conduct random drug tests of employees occupying mandatory-testing or special-risk positions if the testing is performed in accordance with drug-testing rules adopted by the Agency for

Health Care Administration; requiring that a public sector employer assign a public sector employee to a position other than a mandatory-testing position if the employee enters an employee assistance program or drug and alcohol rehabilitation program; amending s. 944.474, F.S.; revising provisions governing employees of the state correctional system, to conform to changes made by the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (5), (7), and (8) and paragraphs (h), (i), (j), and (k) of subsection (10) of section 112.0455, Florida Statutes, are amended to read:

112.0455 Drug-Free Workplace Act.—

(5) DEFINITIONS.—Except where the context otherwise requires, as used in this act:

(a) “Drug” means alcohol, including distilled spirits, wine, malt beverages, and intoxicating liquors; amphetamines; cannabinoids; cocaine; phencyclidine (PCP); hallucinogens; methaqualone; opiates; barbiturates; benzodiazepines; synthetic narcotics; designer drugs; or a metabolite of any of the substances listed herein.

(b) “Drug test” or “test” means any chemical, biological, or physical instrumental analysis administered for the purpose of determining the presence or absence of a drug or its metabolites.

(c) “Initial drug test” means a sensitive, rapid, and reliable procedure to identify negative and presumptive positive specimens. All initial tests must ~~shall~~ use an immunoassay procedure or an equivalent, or must shall use a more accurate scientifically accepted method approved by the Agency for Health Care Administration as ~~such~~ more accurate technology becomes available in a cost-effective form.

(d) “Confirmation test,” “confirmed test,” or “confirmed drug test” means a second analytical procedure used to identify the presence of a specific drug or metabolite in a specimen. The confirmation test must be different in scientific principle from that of the initial test procedure. This confirmation method must be capable of providing requisite specificity, sensitivity, and quantitative accuracy.

(e) “Chain of custody” refers to the methodology of tracking specified materials or substances for the purpose of maintaining control and accountability from initial collection to final disposition for all such materials or substances and providing for accountability at each stage in handling, testing, storing specimens, and reporting of test results.

(f) “Job applicant” means a person who has applied for a ~~special-risk or safety-sensitive~~ position with an employer and has been offered employment conditioned upon successfully passing a drug test.

(g) “Employee” means ~~a~~ any person who works for salary, wages, or other remuneration for an employer.

(h) “Employer” means ~~an~~ any agency within state government that employs individuals for salary, wages, or other remuneration.

(i) “Prescription or nonprescription medication” means a drug or medication obtained pursuant to a prescription as defined by s. 893.02 or a medication that is authorized pursuant to federal or state law for general distribution and use without a prescription in the treatment of human diseases, ailments, or injuries.

(j) “Random testing” means a drug test conducted on employees who are selected through the use of a computer-generated random sample of an employer’s employees.

(k)(j) “Reasonable suspicion drug testing” means 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. Reasonable suspicion drug testing may ~~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. Among other things, such facts and inferences may be based upon:

1. 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.

2. Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.

3. A report of drug use, provided by a reliable and credible source, which has been independently corroborated.

4. Evidence that an individual has tampered with a drug test during employment with the current employer.

5. Information that an employee has caused, or contributed to, an accident while at work.

6. 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.

(l)(k) “Specimen” means a tissue, hair, or product of the human body capable of revealing the presence of drugs or their metabolites.

(m)(l) “Employee assistance program” means an established program for employee assessment, counseling, and possible referral to an alcohol and drug rehabilitation program.

~~(m) “Safety-sensitive position” means any position, including a supervisory or management position, in which a drug impairment would constitute an immediate and direct threat to public health or safety.~~

(n) “Special risk” means employees who are required as a condition of employment to be certified under chapter 633 or chapter 943.

(7) TYPES OF TESTING.—Drug testing must be conducted within each agency’s appropriation. An employer may conduct ~~is authorized, but is not required, to conduct,~~ the following types of drug tests:

(a) Job applicant testing.—An employer may require job applicants to submit to a drug test and may use a refusal to submit to a drug test or a positive confirmed drug test as a basis for refusal to hire the job applicant.

(b) Reasonable suspicion.—An employer may require an employee to submit to reasonable suspicion drug testing.

(c) Random testing.—An employer may conduct random testing once every 3 months. The random sample of employees chosen for testing must be computer-generated by an independent third party. A random sample may not constitute more than 10 percent of the total employee population.

~~(d)~~(e) Routine fitness for duty.—An employer may require an employee to submit to a drug test if the test is conducted as part of a routinely scheduled employee 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.

~~(e)~~(d) Followup testing.—If the employee in the course of employment enters an employee assistance program for drug-related problems, or an alcohol and drug rehabilitation program, the employer may require the said employee to submit to a drug test as a followup to such program, and on a quarterly, semiannual, or annual basis for up to 2 years thereafter.

(8) PROCEDURES AND EMPLOYEE PROTECTION.—All specimen collection and testing for drugs under this section shall be performed in accordance with the following procedures:

(a) A sample shall be collected with due regard to the privacy of the individual providing the sample, and in a manner reasonably calculated to prevent substitution or contamination of the sample.

(b) Specimen collection shall be documented, and the documentation procedures shall include:

1. Labeling of specimen containers so as to reasonably preclude the likelihood of erroneous identification of test results.

2. A form for the employee or job applicant to provide any information he or she considers relevant to the test, including identification of currently or

recently used prescription or nonprescription medication, or other relevant medical information. Such form shall provide notice of the most common medications by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. The providing of information does ~~shall~~ not preclude the administration of the drug test, but shall be taken into account in interpreting any positive confirmed results.

(c) Specimen collection, storage, and transportation to the testing site shall be performed in a manner that ~~which~~ will reasonably preclude specimen contamination or adulteration.

(d) Each initial and confirmation test conducted under this section, not including the taking or collecting of a specimen to be tested, shall be conducted by a licensed laboratory as described in subsection (12).

(e) A specimen for a drug test may be taken or collected by any of the following persons:

1. A physician, a physician's assistant, a registered professional nurse, a licensed practical nurse, a nurse practitioner, or a certified paramedic who is present at the scene of an accident for the purpose of rendering emergency medical service or treatment.

2. A qualified person employed by a licensed laboratory.

(f) A person who collects or takes a specimen for a drug test conducted pursuant to this section shall collect an amount sufficient for two drug tests as determined by the Agency for Health Care Administration.

(g) Any drug test conducted or requested by an employer may occur before, during, or immediately after the regular work period of the employee, and shall be deemed to be performed during work time for the purposes of determining compensation and benefits for the employee.

(h) Every specimen that produces a positive confirmed result shall be preserved by the licensed laboratory that conducts the confirmation test for a period of at least 210 days from the time the results of the positive confirmation test are mailed or otherwise delivered to the employer. However, if an employee or job applicant undertakes an administrative or legal challenge to the test result, the employee or job applicant shall notify the laboratory and the sample shall be retained by the laboratory until the case or administrative appeal is settled. During the 180-day period after written notification of a positive test result, the employee or job applicant who has provided the specimen shall be permitted by the employer to have a portion of the specimen retested, at the employee or job applicant's expense, at another laboratory, licensed and approved by the Agency for Health Care Administration, chosen by the employee or job applicant. The second laboratory must test at equal or greater sensitivity for the drug in question as the first laboratory. The first laboratory that ~~which~~ performed the test for the employer is ~~shall be~~ responsible for the transfer of the portion of the

specimen to be retested, and for the integrity of the chain of custody during such transfer.

(i) Within 5 working days after receipt of a positive confirmed test result from the testing laboratory, an employer shall inform an employee or job applicant in writing of such positive test result, the consequences of such results, and the options available to the employee or job applicant.

(j) The employer shall provide to the employee or job applicant, upon request, a copy of the test results.

(k) Within 5 working days after receiving notice of a positive confirmed test result, the employee or job applicant may submit information to an employer explaining or contesting the test results, and why the results do not constitute a violation of the employer's policy.

(l) If an employee or job applicant's explanation or challenge of the positive test results is unsatisfactory to the employer, a written explanation as to why the employee or job applicant's explanation is unsatisfactory, along with the report of positive results, shall be provided by the employer to the employee or job applicant. All such documentation shall be kept confidential and exempt from the provisions of s. 119.07(1) by the employer pursuant to subsection (11) and shall be retained by the employer for at least 1 year.

(m) An No employer may not discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an employee or job applicant on the sole basis of a positive test result that has not been verified by a confirmation test.

~~(n) In addition to the limitation under paragraph (m):~~

~~1. Except as provided in subparagraph 3., no employer may discharge, discipline, or discriminate against an employee on the sole basis of the employee's first positive confirmed drug test, unless the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under a health insurance plan, an employee assistance program or an alcohol and drug rehabilitation program, and:~~

~~a. The employee has either refused to participate in the employee assistance program or the alcohol and drug rehabilitation program or has failed to successfully complete such program, as evidenced by withdrawal from the program before its completion or a report from the program indicating unsatisfactory compliance, or by a positive test result on a confirmation test after completion of the program; or~~

~~b. 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 an employee assistance program or an alcohol and drug rehabilitation program.~~

~~2.—An employee in a safety-sensitive position shall be placed by the employer in a non-safety-sensitive position, or if such position is unavailable, on leave status while participating in an employee assistance program or an alcohol and drug rehabilitation program. If placed on leave status without pay, the employee shall be permitted to use any accumulated leave credits prior to being placed on leave without pay.~~

~~3.—A special risk employee may be discharged or disciplined for the first positive confirmed drug test result when illicit drugs, pursuant to s. 893.13, are confirmed. No special risk employee shall be permitted to continue work in a safety-sensitive position, but may be placed either in a non-safety-sensitive position or on leave status while participating in an employee assistance program or an alcohol and drug rehabilitation program.~~

~~(n)(e)~~ Upon successful completion of an employee assistance program or an alcohol and drug rehabilitation program, the employee shall be reinstated to the same or equivalent position that was held prior to such rehabilitation.

~~(o)(p)~~ An ~~No~~ employer may not discharge, discipline, or discriminate against an employee, or refuse to hire a job applicant, on the basis of any prior medical history revealed to the employer pursuant to this section.

~~(p)(q)~~ An employer who performs drug testing or specimen collection shall use chain-of-custody procedures as established by the Agency for Health Care Administration to ensure proper recordkeeping, handling, labeling, and identification of all specimens to be tested.

~~(q)(r)~~ An employer shall pay the cost of all drug tests, initial and confirmation, which the employer requires of employees.

~~(r)(s)~~ An employee or job applicant shall pay the costs of any additional drug tests not required by the employer.

~~(s)(t)~~ An ~~No~~ employer may not shall discharge, discipline, or discriminate against an employee solely upon voluntarily seeking treatment, while under the employ of the employer, for a drug-related problem if the employee has not previously tested positive for drug use, entered an employee assistance program for drug-related problems, or entered an alcohol and drug rehabilitation program. However, special risk employees may be subject to discharge or disciplinary action when the presence of illicit drugs, pursuant to s. 893.13, is confirmed.

~~(t)(u)~~ If ~~Where~~ testing is conducted based on reasonable suspicion, each employer shall promptly detail in writing the circumstances which formed the basis of the determination that reasonable suspicion existed to warrant the testing. A copy of this documentation shall be given to the employee upon request and the original documentation shall be kept confidential and exempt from the provisions of s. 119.07(1) by the employer pursuant to subsection (11) and retained by the employer for at least 1 year.

~~(u)(v)~~ If an employee is unable to participate in outpatient rehabilitation, the employee may be placed on leave status while participating in an employee assistance program or an alcohol and drug rehabilitation program. If placed on leave-without-pay status, the employee shall be permitted to use any accumulated leave credits prior to being placed on leave without pay. Upon successful completion of an employee assistance program or an alcohol and drug rehabilitation program, the employee shall be reinstated to the same or equivalent position that was held prior to such rehabilitation.

(10) EMPLOYER PROTECTION.—

~~(h) An employer may discharge or discipline shall refer an employee following with a first-time positive confirmed drug test result. If the employer does not discharge the employee, the employer may refer the employee to an employee assistance program or an alcohol and drug rehabilitation program in which the employee may participate at the expense of the employee or pursuant to a health insurance plan, unless such employee is discharged as provided in subparagraph (8)(n)3. If the results of a subsequent confirmed drug test are positive, the employer may discharge or discipline the employee.~~

1. If an employer refers an employee to an employee assistance program or an alcohol and drug rehabilitation program, the employer must determine whether the employee is able to safely and effectively perform the job duties assigned to the employee while the employee participates in the employee assistance program or the alcohol and drug rehabilitation program.

2. An employee whose assigned duties require the 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, or hold a position in which a momentary lapse in attention could result in injury or death to another person, is deemed unable to safely and effectively perform the job duties assigned to the employee while the employee participates in the employee assistance program or the alcohol and drug rehabilitation program.

3. If an employer refers an employee to an employee assistance program or an alcohol and drug rehabilitation program and the employer determines that the employee is unable, or the employee is deemed unable, to safely and effectively perform the job duties assigned to the employee before he or she completes the employee assistance program or the alcohol and drug rehabilitation program, the employer shall place the employee in a job assignment that the employer determines the employee can safely and effectively perform while participating in the employee assistance program or the alcohol and drug rehabilitation program.

4. If a job assignment in which the employee may safely and effectively perform is unavailable, the employer shall place the employee on leave status while the employee is participating in an employee assistance program or an alcohol and drug rehabilitation program. If placed on leave status without pay, the employee may use accumulated leave credits before being placed on leave without pay.

~~(i) Nothing in This section does not shall be construed to prohibit an employer from conducting medical screening or other tests required by any statute, rule, or regulation for the purpose of monitoring exposure of employees to toxic or other unhealthy substances in the workplace or in the performance of job responsibilities. Such screening or tests shall be limited to the specific substances expressly identified in the applicable statute, rule, or regulation, unless prior written consent of the employee is obtained for other tests.~~

~~(j) An employer shall place a safety-sensitive position employee whose drug test result is confirmed positive in a non-safety-sensitive position, or if such a position is unavailable, on leave status while the employee participates in an employee assistance program or an alcohol and drug rehabilitation program. If placed on leave status without pay, the employee shall be permitted to use any accumulated leave credits prior to being placed on leave without pay.~~

~~(k) A special risk employee may be discharged or disciplined on the first positive confirmed drug test result when illicit drugs, pursuant to s. 893.13, are confirmed. No special risk employee shall be permitted to continue work in a safety-sensitive position, but may be placed either in a non-safety-sensitive position or on leave status while participating in an employee assistance program or an alcohol and drug rehabilitation program.~~

Section 2. Paragraphs (j) and (o) of subsection (1), subsection (2), paragraph (g) of subsection (7), and subsection (11) of section 440.102, Florida Statutes, are amended to read:

440.102 Drug-free workplace program requirements.—The following provisions apply to a drug-free workplace program implemented pursuant to law or to rules adopted by the Agency for Health Care Administration:

(1) DEFINITIONS.—Except where the context otherwise requires, as used in this act:

(j) “Job applicant” means a person who has applied for a position with an employer and has been offered employment conditioned upon successfully passing a drug test, and may have begun work pending the results of the drug test. For a public employer, “job applicant” means only a person who has applied for a special-risk or mandatory-testing safety-sensitive position.

(o) “Mandatory-testing position” means, with respect to a public employer, a job assignment that requires the 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, or a job assignment that requires an employee security background check, pursuant to s. 110.1127, or a job assignment in which a momentary lapse in attention could result in injury or death to another person. "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.

(2) DRUG TESTING.—An employer may test an employee or job applicant for any drug described in paragraph (1)(c). In order to qualify as having established a drug-free workplace program under this section and to qualify for the discounts provided under s. 627.0915 and deny medical and indemnity benefits under this chapter, an employer must, at a minimum, implement drug testing that conforms to the standards and procedures established in this section and all applicable rules adopted pursuant to this section as required in subsection (4). However, an employer does not have a legal duty under this section to request an employee or job applicant to undergo drug testing. If an employer fails to maintain a drug-free workplace program in accordance with the standards and procedures established in this section and in applicable rules, the employer is ineligible for discounts under s. 627.0915. However, an employer qualifies for discounts under s. 627.0915 if the employer maintains a drug-free workplace program that is broader in scope than that provided for by the standards and procedures established in this section. An employer who qualifies ~~All employers qualifying~~ for and ~~receives receiving~~ discounts provided under s. 627.0915 must be reported annually by the insurer to the department.

(7) EMPLOYER PROTECTION.—

(g) This section does not prohibit an employer from conducting medical screening or other tests required, permitted, or not disallowed by any statute, rule, or regulation for the purpose of monitoring exposure of employees to toxic or other unhealthy substances in the workplace or in the performance of job responsibilities. Such screening or testing is limited to the specific substances expressly identified in the applicable statute, rule, or regulation, unless prior written consent of the employee is obtained for other tests. Such screening or testing need not be in compliance with the rules adopted by the Agency for Health Care Administration under this chapter or under s. 112.0455. A public employer may, through the use of an unbiased selection procedure, conduct random drug tests of employees occupying mandatory-testing ~~safety-sensitive or special-risk~~ positions if the testing is performed in

accordance with drug-testing rules adopted by the Agency for Health Care Administration and the department. ~~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.~~

(11) PUBLIC EMPLOYEES IN MANDATORY-TESTING SAFETY-SENSITIVE OR SPECIAL-RISK POSITIONS.—

(a) If an employee who is employed by a public employer in a mandatory-testing safety-sensitive position enters an employee assistance program or drug rehabilitation program, the employer must assign the employee to a position other than a mandatory-testing safety-sensitive position or, if such position is not available, place the employee on leave while the employee is participating in the program. However, the employee shall be permitted to use any accumulated annual leave credits before leave may be ordered without pay.

(b) An employee who is employed by a public employer in a special-risk position may be discharged or disciplined by a public employer for the first positive confirmed test result if the drug confirmed is an illicit drug under s. 893.03. A special-risk employee who is participating in an employee assistance program or drug rehabilitation program may not be allowed to continue to work in any special-risk or mandatory-testing safety-sensitive position of the public employer, but may be assigned to a position other than a mandatory-testing safety-sensitive position or placed on leave while the employee is participating in the program. However, the employee shall be permitted to use any accumulated annual leave credits before leave may be ordered without pay.

Section 3. Section 944.474, Florida Statutes, is amended to read:

944.474 Legislative intent; employee wellness program; drug and alcohol testing.—

(1) It is the intent of the Legislature that the state correctional system provide a safe and secure environment for both inmates and staff. A healthy workforce is a productive workforce, and security of the state correctional system can best be provided by strong and healthy employees. The Department of Corrections may develop and implement an employee wellness program. The program may include, but is not limited to, wellness education, smoking cessation, nutritional education, and overall health-risk reduction, including the effects of using drugs and alcohol.

(2) An employee ~~Under no circumstances shall employees~~ of the department may not test positive for illegal use of controlled substances. An employee of the department may not be under the influence of alcohol while on duty. In order to ensure that these prohibitions are adhered to by all employees of the department and notwithstanding s. 112.0455, the department may develop a program for the drug testing of all job applicants and for the random drug testing of all employees. The department may randomly

evaluate employees for the contemporaneous use or influence of alcohol through the use of alcohol tests and observation methods. Notwithstanding s. 112.0455, the department may develop a program for the reasonable suspicion drug testing of employees who are in mandatory-testing positions, as defined in s. ~~440.102(1)(o)~~, ~~safety-sensitive~~ or special risk positions, as defined in s. 112.0455(5), for the controlled substances listed in s. 893.03(3)(d). The reasonable suspicion drug testing authorized by this subsection shall be conducted in accordance with s. 112.0455, but may also include testing upon reasonable suspicion based on violent acts or violent behavior of an employee who is on or off duty. The department shall adopt rules pursuant to ss. 120.536(1) and 120.54 that are necessary to administer this subsection.

Section 4. This act shall take effect July 1, 2012.

Approved by the Governor March 19, 2012.

Filed in Office Secretary of State March 19, 2012.