

HOUSE BILL REPORT

2SSB 5516

As Reported By House Committee On:

Commerce & Labor

Title: An act relating to providing for drug-free workplaces.

Brief Description: Providing for drug-free workplaces.

Sponsors: Senate Committee on Labor, Commerce & Trade (originally sponsored by Senators Owen, Prentice, Deccio, Palmer, Sutherland, McDonald, Rinehart, Haugen, Sheldon, Heavey, Fraser, Franklin, Bauer, Roach and Rasmussen).

Brief History:

Committee Activity:

Commerce & Labor: 2/22/96 [DPA].

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: Do pass as amended. Signed by 11 members: Representatives McMorris, Chairman; Hargrove, Vice Chairman; Romero, Ranking Minority Member; Conway, Assistant Ranking Minority Member; Cairnes; Cody; Cole; Fuhrman; Goldsmith; Horn and Lisk.

Staff: Chris Cordes (786-7117).

Background: All covered employers, except those self-insured, are required to satisfy their workers' compensation obligations by purchasing insurance from the Department of Labor and Industries. The department has several premium discount programs, including a retrospective rating program, but does not have a program that gives premium discounts for employers who maintain drug-free workplaces. Since 1993, both Florida and Georgia have allowed premium discounts for employers who implement drug-free workplace programs.

Summary of Amended Bill:

Overview

A program is established for state-fund employers, except public employers, to implement certified drug-free workplace programs and receive a 5 percent discount on certain industrial insurance premiums for up to three years.

Employers who are self-insured for industrial insurance are to be notified of the value of the program and encouraged to implement drug-free workplace programs.

This premium discount program expires January 1, 2001.

Industrial insurance premium discount

Eligible employers who implement drug-free workplace programs that are certified by the Division of Alcohol and Substance Abuse of the Department of Social and Health Services (DSHS) qualify for a 5 percent medical aid fund and accident fund premium discount. In addition to meeting program standards, the employer must be and remain in good standing with respect to his or her workers' compensation premiums and must have medical insurance available to his or her full-time employees through an employer, union, or jointly sponsored medical plan.

Employers whose substance abuse testing programs reasonably meet all the discount requirements as of July 1, 1996, are not eligible for certification.

The DSHS may charge a fee for certification that must approximate its administrative costs related to certification.

The discount must remain in effect as long as the employer is certified, up to a maximum of three years from the date of initial certification. The employer must be certified for each year in which a discount is granted. If the employer stops operating the program, the premium discount qualification will expire as specified in the DSHS rules.

An employer may not receive premium discounts from the Department of Labor and Industries under more than one discount program. If participating in another premium discount program, the employer is entitled only to the premium discount that is the highest.

The total amount of premium discount that is available under the program in any fiscal year may not exceed \$5 million.

Requirements for drug-free workplace programs

To qualify for a premium discount, a drug-free workplace program must include the following elements

Written policy statement. A written substance abuse policy statement must include

- (1) Notice to employees that the use or being under the influence of alcohol during working hours is prohibited, that the use, purchase, possession, or transfer of

drugs or having illegal drugs in their systems is prohibited, and that prescription and nonprescription medications may be taken as lawfully prescribed or consistent with standard dosages.

- (2) Identification of the types of testing that an employee or job applicant may be required to submit to, the actions the employer may take based on a verified positive test result, and the consequences of refusing to submit to a test.
- (3) Notice of the existence of the state statutory drug-free workplace program and the provisions of the federal drug-free workplace act, if applicable.
- (4) Notice of the employee assistance program.
- (5) Notice of the employee's or job applicant's right to contest or explain a verified positive test result within five working days after written notification.
- (6) Notice of possible discipline for failure to report a workplace injury.
- (7) A general statement regarding confidentiality.

Unless the employer had a substance abuse testing program in place before July 1, 1996, an employer implementing a program must allow 60 days to elapse between giving a general one-time notice to all employees of the program and beginning actual testing.

Notice of substance abuse testing must be given to all job applicants, and the policy must be posted in an appropriate and conspicuous location on the employer's premises. Copies of the policy must be available for inspection by employees or job applicants.

Substance abuse testing protocol. The employer's substance abuse testing program must meet the following standards:

- (1) Require job applicants to submit to drug testing after an offer of employment is made. Refusal to submit to testing or a verified positive test may be used by the employer as a basis for not hiring the applicant.
- (2) Investigate all workplace injuries that result in off-site medical treatment of a worker and require the employee to submit to drug and alcohol tests if the employer reasonably believes that the employee has caused or contributed to the injury. However, testing is not required if an appropriately trained supervisor reasonably believes that the injury was due to the inexperience of the employee, to a defective or unsafe product or working condition, or to other circumstances beyond the employee's control.

- (3) Require employees to submit to alcohol and drug testing in conjunction with a rehabilitation program if the employee is referred to the employee assistance program by the employer as the result of a positive alcohol or drug test or an alcohol or drug-related incident in violation of employer rules. A positive follow-up test will normally result in termination of the employee.
- (4) Collect specimens in accordance with regulations and procedures approved by the U.S. Department of Health and Human Services and the U.S. Department of Transportation, including procedures giving due regard for privacy and the prevention of substitution or contamination of the specimen, for labeling of the specimen, for allowing an opportunity for the employee or job applicant to provide information, and for conducting the test in an laboratory approved by the Substance Abuse and Mental Health Administration or the College of American Pathologists, using specified procedures.
- (5) Inform the employee or job applicant of a verified positive test result within five days of receiving the result and provide information about the consequences of the result and options. A copy of the test results must be provided to the employee or job applicant on request.
- (6) Pay the costs of all testing required by the employer.

An employer following these requirements is not prohibited from conducting tests for other reasons, such as for reasonable suspicion or on a random basis.

Employee assistance program. The employer must have an employee assistance program to deal with employees whose job performances are declining due to unresolved problems, including alcohol or other drug-related problems, marital problems, or legal or financial problems. The employer must notify employees of the benefits and services, including publication in conspicuous places, and of the procedures to use the program.

A list of approved employee assistance programs must be provided by the DSHS according to recognized program standards.

A primary focus of employee assistance programs must be rehabilitation of employees suffering from alcohol or drug addiction. Last-chance agreements must be offered to employees with a first-time positive test result and must require the employee to submit to an evaluation, comply with recommended treatment, be subject to follow-up testing for two years, meet performance standards set for other employees, and authorize the employer to receive all relevant information regarding the employee's progress in treatment. Failure to comply with a last-chance agreement normally will result in termination of employment.

Employee and supervisor training. Employees must be provided with a minimum one-hour annual education program on substance abuse, including an explanation of the disease model of addiction, the effects and dangers of commonly abused substances in the workplace, and the employer's policies and procedures regarding substance abuse and opportunities for treatment.

Supervisors must have a minimum of two hours of additional training that should include information on recognizing signs of employee substance abuse, documenting signs of substance abuse, referring to the employee assistance program or treatment provider, and circumstances and procedures for postinjury testing.

Confidentiality requirements. Information or test results received through a substance abuse testing program are confidential communications and may not be used in evidence or in proceedings, except an employer is not prohibited from using information concerning an employee or job applicant's substance abuse test results in a lawful manner, and other entities are not prohibited from disclosing or using the information in a lawful manner as part of a matter relating to the test, the test result, or an employer action with respect to the employee or applicant.

Any release of information requires written consent signed voluntarily by the person tested, unless release is compelled by the DSHS or a court of competent jurisdiction in accordance with state and federal confidentiality laws, or is required by a professional licensing board in a related disciplinary proceeding.

Information on test results is inadmissible as evidence against the employee or job applicant in a criminal proceeding.

Employee termination

A first-time verified positive test result may not be used as a basis to terminate an employee, but the employee may be terminated for independent reasons, such as violation of a safety rule. An employer may also terminate an employee for refusal to submit to a drug or alcohol test, refusal to agree to or comply with a last-chance agreement, a second verified positive test, or violation of employer rules pertaining to alcohol and drugs after the first verified positive test. The employer's ability to terminate employment for any other reason is not limited.

Other provisions

A physician-patient relationship is not created between the employee or job applicant and the employer or person evaluating a drug or alcohol test solely by the implementation of a drug or alcohol testing program.

These provisions regarding substance abuse testing programs do not prevent employers from (1) having reasonable work rules relating to possession, use, or sale of drugs, and convictions for drug-related offenses, and taking actions based on a violation of the rules; or (2) conducting medical screening required, permitted, or not disallowed by statute or rule for monitoring exposure of employees to toxic materials in the workplace. The screening must be limited to the specific material identified in statute or rule unless prior written consent of the employee is obtained.

These provisions do not establish a legal duty for an employer to conduct alcohol or drug testing of employees or job applicants. The provisions do not operate retroactively and do not abrogate the employer's right to implement drug and alcohol testing programs under state or federal law.

A cause of action may not arise based on the failure of an employer to establish a substance abuse testing program or to conduct a program in conformance with the statutory standards. The substance abuse testing program requirements may be enforced only by denial of the workers' compensation premium discount.

These provisions do not create or alter an obligation to bargain with a collective bargaining representative of employees.

Studies and reports

The DSHS is required to conduct an evaluation to determine the costs and benefits of the program, and the Department of Labor and Industries must evaluate the effect of the premium discount on workplace safety and the state fund. Preliminary findings must be reported to the Legislature on September 1, 1997 and 1998, with final reports on December 1, 1999.

Rules authority

The DSHS may adopt rules necessary to implement the program and must adopt rules providing procedures and forms for certifying employers who establish and maintain drug-free workplace programs and for decertifying employers.

The Department of Labor and Industries may adopt rules necessary to implement the program, including provisions for penalties and repayment of premium discounts for employers that are decertified.

Amended Bill Compared to Second Substitute Bill: The amended bill makes the following changes to the second substitute bill: (1) the definition of "employers" covered by the act is modified to clarify that only employers subject to industrial insurance are covered and that the exemption for public employers that includes references to county or independent schools means school districts and educational

service districts; (2) the definition of "specimen" is modified to mean only breath and urine, unless another body product is approved for testing by the U.S. Department of Health and Human Services and permitted under Department of Social and Health Services' rules; (3) a definition of "workers' compensation premium" is added and means the medical aid fund premium and the accident fund premium; (4) it is clarified that the three-year period of premium discount eligibility begins on the date of the initial certification of an employer's program and that the requirement to investigate injuries applies to workplace injuries; and (5) technical changes are included to make the language of the bill consistent throughout the bill, and to modify definitions to be consistent with other parts of the bill.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: There has been a great deal of work with the labor community to amend the bill to address their concerns. This bill is needed because \$100 billion is lost in productivity to American businesses annually because of substance abuse. The premium discount is an incentive to get businesses to participate and the discount ends after three years. No employer is required to participate. The program benefits workers by providing them opportunities for treatment. Health insurance coverage must be made available to the workers of the participating employer. Generally, health insurance policies will cover the cost of treatment.

Testimony Against: None.

Testified: Senator Brad Owen, prime sponsor; Mark Berry, Washington Drug Free Business; and Clif Finch, Association of Washington Business.