

HOUSE BILL REPORT

SSB 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: 3/23/95, 3/30/95 [DPA].

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: Do pass as amended. Signed by 9 members: Representatives Lisk, Chairman; Thompson, Vice Chairman; Romero, Ranking Minority Member; Conway, Assistant Ranking Minority Member; Cairnes; Cody; Cole; Goldsmith and Horn.

Minority Report: Without recommendation. Signed by 1 member: Representative Hargrove, Vice Chairman.

Staff: Chris Cordes (786-7117).

Background: All covered employers, except employers who are self-insured, are required to satisfy their workers' compensation obligations by purchasing insurance from the Department of Labor and Industries. The department does not have a program that gives premium discounts for employers who maintain drug-free workplaces. Since 1993, both Florida and Georgia have implemented premium discounts programs based on drug-free workplaces.

Summary of Amended Bill:

Overview

A program is established for employers covered by the industrial insurance law, except self-insured employers and public employers, to implement a certified drug-free workplace program and receive a 5 percent discount on industrial insurance premiums.

These provisions expire July 1, 1999.

Industrial insurance premium discount

Covered employers may have a policy implementing a drug-free workplace program if the policy is included in a collective bargaining agreement or, if no agreement applies, the employers and employees agree to the policy. If the program is certified by the Division of Alcohol and Substance Abuse of the Department of Social and Health Services (DSHS), the employer will qualify for a 5 percent industrial insurance premium discount. The portion of the discount granted for the medical aid fund premium must be shared equally with employees. In addition to meeting program standards, the employer must be and remain in good standing with respect to his or her workers' compensation premiums.

Employers who have drug-free workplace programs that meet all of the discount requirements as of July 1, 1995, are not eligible for certification. Employers whose programs meet some of the requirements on July 1, 1995, may be eligible for certification if all the requirements are subsequently met.

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 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 eligible for a premium discount under another program, the employer is entitled 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 five million dollars.

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 system 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, 1995, 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) require an employee to submit to drug and alcohol tests if the employer has reasonable suspicion to believe that the employee is impaired by or under the influence of drugs or alcohol in the course of employment.
- (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 require 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 a 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.

A workplace safety committee must monitor the program and make recommendations, at least annually for improving the program.

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, 1996 and 1997, with final reports on December 1, 1998.

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 Substitute Bill: The striking amendment makes technical and clarifying changes to make the language of the bill consistent throughout the bill. In addition, the amendment makes the following substantive changes: (1) the requirement for self-insured employers to maintain drug-free workplace programs is deleted. The definition of "employer" is modified to clarify that only employers subject to industrial insurance are covered and that, in addition to public employers, self-insured employers are excluded; (2) an employer is permitted to implement a drug-free workplace policy that qualifies for the premium discount if the policy is included in a collective bargaining agreement applicable to the workplace or if the employer and the employees agree to the policy; (3) the premium discount for the medical aid premium must be shared equally with employees; (4) 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; (5) the requirement is deleted that drug-free workplace programs include investigation of all workplace injuries that result in off-site medical attention, and include drug and alcohol testing if the employer reasonably believes that the employee caused or contributed to the injury. Instead, these programs must require drug and alcohol testing if the employer has reasonable suspicion to believe that the employee is impaired by or under the influence of drugs or alcohol in the course of employment; (6) a workplace safety committee must monitor the substance abuse testing program and make periodic recommendations, at least annually, for improving the program; (7) an effective date of July 1, 1995, is added; and (8) the program is terminated July 1, 1999, instead of January 1, 2001.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill contains an emergency clause and takes effect July 1, 1995.

Testimony For: (1) This bill attempts to address the concerns of all parties. Testing is only required for preemployment screening and following accidents. Implementing this program will result in reduced accidents and less time lost from work, which means savings to the state industrial insurance fund. This is an incentive for businesses to create safer workplaces because both the employer and the employees benefit. It also helps employees get the assistance that they may need, thereby reducing social problems, such as family abuse and driving under the influence. (2) Failure to reduce abuse of drugs and alcohol leads to many social ills. The workplace is critical to the lives of employees and should be used as one more piece of a total program to support drug-reduction programs. The effort must be a partnership between businesses and the government. While large companies generally have testing programs, many mid-sized companies do not. The premium discount program is a

way to motivate participation by these employers. This bill requires a correctly set up program before an employer can be certified for the premium discount. The bill is a national model. (3) Some businesses have shown substantial gains by implementing drug testing programs. Both the employees and their families support the effort to make the workplace safer. Collective bargaining agreements frequently contain testing policies that work very well and have been shown to benefit the employees and the company. By cooperating on the development of these policies, both management and labor have learned a new ethic of cooperation. (4) The bill's requirement that self-insurers must have a program should be removed or changed. The bill is intended to create incentives, not mandates.

Testimony Against: (1) Drug testing policies under collective bargaining agreements call for testing upon "reasonable suspicion," not whenever there is an accident. Does this mean that collective bargaining agreements are overridden? There is concern about what a drug test might reveal about the person's health, even though that revelation is inadvertent, especially since the bill permits testing of more than just breath and urine. The provisions of the bill that require an employee assistance program and rehabilitation for the workers are supported. However, many people refuse to take drug tests on principle, not because they are drug users. (2) This bill is about employer power over the lives of workers. The state Legislature should not follow the lead of the federal courts in construing privacy rights too narrowly. Public employees do have some privacy protections, and these rights should not be taken away from private sector employees. This bill does not prohibit intrusive testing, such as random testing. This kind of program is very harmful to employee morale.

Testified: (In favor) Senator Brad Owen, prime sponsor; John W. Fenton, Washington Drug Free Business; Winlock Pickering, president and CEO (retired) of King County Medical Blue Shield; Joy Hawley, Washington State Substance Abuse Coalition; and Bill Vogel, Lake Union Drydock Company. (Opposed) Robby Stern, Washington State Labor Council; and Jerry Sheehan, American Civil Liberties Union.