



OHIO LEGISLATIVE SERVICE COMMISSION

Bill Analysis

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H.B. 424

132nd General Assembly
(As Introduced)

Reps. Wiggam, Becker, Riedel, Lang, Thompson, Roegner, Koehler

BILL SUMMARY

- Enacts the "Substance Recovery and Workforce Improvement Act."
- Specifies that an individual was discharged for just cause, and thus disqualified from receiving unemployment benefits, if the individual was discharged from employment with the individual's most recent employer for failing or refusing to submit to a drug test required by the employer as a condition of continued employment.
- Allows an employer who discharges an individual from employment for failing or refusing to submit to a drug test required by the employer as a condition of continued employment to voluntarily submit to the Director of Job and Family Services information necessary to identify the individual.
- Requires the Director to establish and maintain a database of the reported individuals and requires the Director to use the database in determining whether an individual qualifies for unemployment benefits.
- Considers an individual who fails or refuses to submit to a drug test as a condition of an offer of employment while serving a waiting period or being paid unemployment benefits to have refused without good cause an offer of suitable work, and thus, disqualifies the individual from receiving unemployment benefits.
- Allows an employer to voluntarily submit to the Director information necessary to identify any individual who fails or refuses to submit to a drug test as a condition of an offer of employment.
- Requires the Director to determine whether an individual is serving a waiting period or being paid unemployment benefits on receipt of notification from an

employer that an individual failed or refused to submit to a drug test as a condition of an offer of employment.

- Requires the Director to drug test an unemployment benefit applicant if the Director has reasonable cause to suspect that the individual has engaged in the unlawful use of a controlled substance and the individual was discharged from employment with the individual's most recent employer because of the unlawful use.
- Requires an individual to disclose at the time of filing an initial unemployment application whether the individual was separated from the individual's most recent employer because of the unlawful use of a controlled substance.
- Disqualifies an individual who is required by the bill to submit to a drug test by the Director and who fails or refuses to take the test from receiving unemployment benefits.
- Requires the Director to send a letter to an individual who is disqualified from receiving unemployment benefits under the bill that lists community addiction services providers located near the individual's residence
- Generally prohibits an employer's submission of information to the Director related to drug tests conducted by the employer from being used as the basis of any criminal or civil liability against the employer.
- Requires the Director to adopt rules necessary for the bill's administration.

CONTENT AND OPERATION

Substance Recovery and Workforce Improvement Act

The bill enacts the "Substance Recovery and Workforce Improvement Act."¹ It creates three ways in which an individual can be disqualified from receiving unemployment benefits as a result of failing or refusing to take specified drug tests. A "drug test" under the bill means either a chemical test of an individual's urine, or an oral fluid test that uses a swab, that is conducted to determine whether a controlled substance (a substance listed on a schedule established under the federal Controlled Substances Act) is present in the biological specimen taken from the individual's body. An individual fails a drug test if the test reveals the presence of a controlled substance

¹ Section 3.



unless the individual obtained the controlled substance pursuant to a prescription and the individual used it in accordance with the prescriber's directions.²

The bill requires the Director of Job and Family Services, who administers the Unemployment Compensation Law, to adopt rules necessary for the bill's administration.³

Employer drug tests as a condition of continued employment

Under continuing law, an individual is disqualified from serving a waiting week or receiving unemployment benefits for the duration of the individual's unemployment if the individual was discharged for just cause in connection with the individual's employment.⁴ The bill specifies that an individual was discharged for just cause, and thus disqualified from serving a waiting week or receiving unemployment benefits, if the individual was discharged from employment with the individual's most recent employer for failing or refusing to submit to a drug test required by the employer as a condition of continued employment.

An employer who discharges an individual from employment as described above may voluntarily submit to the Director information necessary to identify the individual. The bill requires the Director to establish and maintain a database of individuals who are reported to the Director for failing or refusing to submit to a drug test as a condition of continued employment. The Director must use the database in determining whether an individual who files an initial application for unemployment benefits is eligible to receive benefits (see **COMMENT 1**).⁵

Employer drug tests as a condition of an offer of employment

Under continuing law, an individual is disqualified from serving a waiting period or being paid unemployment benefits for the duration of the individual's unemployment if the Director finds that the individual has refused without good cause an offer of suitable employment.⁶ The bill considers an individual who fails or refuses to submit to a drug test as a condition of an offer of employment while the individual is serving a waiting period or being paid unemployment benefits to have refused without

² R.C. 4141.294(A).

³ R.C. 4141.294(E). Note that, due to a drafting error, R.C. 4141.294 has two divisions lettered "(E)."

⁴ R.C. 4141.29(D)(2)(a).

⁵ R.C. 4141.294(C).

⁶ R.C. 4141.29(D)(2)(b).



good cause an offer of suitable work. Consequently, the bill disqualifies the individual from serving a waiting period or being paid benefits.

An employer who requires an individual to submit to a drug test as a condition of an offer of employment may voluntarily submit to the Director information necessary to identify any individual who fails or refuses to submit to that drug test not later than seven business days after the day on which the employer discovered the failure or refusal.

On receipt of notification from an employer that an individual failed or refused to submit to such a test, the Director is required to determine whether the individual is serving a waiting period or being paid unemployment benefits (see **COMMENT 1**).⁷

Drug testing of applicants by the Director

Under the bill, the Director must require an individual who has applied for unemployment benefits to take a drug test as part of the individual's benefits eligibility determination if both of the following apply:

- The Director has reasonable cause to suspect that the individual has engaged in the unlawful use of a controlled substance;
- The individual was discharged from employment with the individual's most recent employer because of the unlawful use of a controlled substance.

The bill requires an individual to disclose at the time of filing an initial unemployment application whether the individual was separated from the individual's most recent employer because of the unlawful use of a controlled substance.⁸ The Director must ensure that these drug tests meet or exceed the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs, published by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health. The Director must pay the cost of drug tests from the Unemployment Compensation Administration Fund.

An individual who must submit to a drug test by the Director and who fails or refuses to take the test is ineligible to serve a waiting period or be paid unemployment benefits for the duration of the individual's unemployment (see **COMMENT 2**).⁹

⁷ R.C. 4141.294(B).

⁸ R.C. 4141.28.

⁹ R.C. 4141.294(E) and 4141.10, not in the bill.



Community addiction services providers

If an individual is ineligible to serve a waiting week or receive unemployment benefits under as a result of the bill, the Director must send a letter to the individual listing community addiction services providers located near the individual's residence.¹⁰

Employer liability

Excluding wanton, willful, or intentional misconduct, the bill prohibits an employer's submission of information under the bill from being used as the basis of any criminal or civil liability against the employer.¹¹

Background on drug testing unemployment applicants

Unemployment compensation is a federal-state partnership in which a state must comply with federal laws and regulations for the state to have an approved state system.¹² Federal law limits the circumstances in which an unemployment applicant may be drug tested to the following:

- The claimant was terminated from employment with the claimant's most recent employer because of the unlawful use of controlled substances.
- The claimant is an individual for whom suitable work is only available in an occupation that regularly conducts drug testing, as defined in regulations to be issued by the U.S. Secretary of Labor.¹³

The second allowable reason for drug testing is currently inoperable because the Secretary rescinded the rule defining occupations that regularly conduct drug testing and has yet to issue a new rule.¹⁴

¹⁰ R.C. 4141.294(F).

¹¹ R.C. 4141.294(D).

¹² 26 United States Code (U.S.C.) 3301, 3302, and 3303.

¹³ 42 U.S.C. 503(l).

¹⁴ U.S. Department of Labor, *Unemployment Insurance Program Letter No. 1-15, Change 2*, https://wdr.doleta.gov/directives/attach/UIPL/UIPL_1-15_Change_2_acc.pdf (accessed February 16, 2018).



COMMENT

1. The bill's provisions that rely on employer administered drug tests to disqualify an individual from receiving unemployment benefits may raise issues under the Fourth Amendment of the U.S. Constitution and Article I, Section 14 of the Ohio Constitution. Those constitutional provisions require a search (which includes drug tests) to be based upon an individualized suspicion of personal wrongdoing.¹⁵ Generally, those constitutional provisions only apply to a state action, not the conduct of private actors. According to both the U.S. and Ohio Supreme Courts though, drug testing by private employers can be considered a state action if the private activity results from the state's exercise of coercive power, when the state provides significant encouragement for the activity, either overtly or covertly, or when a private actor operates as a willful participant in joint activity with the state or its agents.¹⁶ Only a court can determine whether the bill's provisions constitute state action. If they do constitute state action, there may be a constitutional issue because the two provisions do not seem to require individualized suspicion for the drug tests.

2. The effect of the provision requiring a drug test due to a discharge because of the unlawful use of a controlled substance is unclear because an individual is not eligible to receive unemployment benefits under continuing law if the individual is discharged for just cause.¹⁷

HISTORY

ACTION

DATE

Introduced

11-21-17

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¹⁵ See *Wolf v. Colorado*, 338 U.S. 25 (1949); *Mapp v. Ohio*, 367 U.S. 643 (1961); *State v. Robinette*, 80 Ohio St.3d 234 (1997); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617-618 (1989); *Chandler v. Miller*, 520 U.S. 305, 313 (1997), citing *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995).

¹⁶ See *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.*, 97 Ohio St.3d 504 (2002), citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) and *Brentwood Academy v. Tennessee Secondary School Athletic Assn.*, 531 U.S. 288, 296 (2001).

¹⁷ R.C. 4141.29(D)(2).

