



**Sub. H.B. 80\***

126th General Assembly

(As Reported by S. Insurance, Commerce, & Labor)

**Reps. G. Smith, Flowers, Hartnett, Calvert, Hagan, D. Stewart, Distel, Yuko, Cassell, Collier, Combs, Allen, Aslanides, Barrett, Blessing, Chandler, Daniels, DeBose, Domenick, C. Evans, Fende, Garrison, Hughes, Key, J. McGregor, Otterman, T. Patton, Schaffer, Schneider, Setzer, Skindell, J. Stewart, Strahorn, Uecker, Williams**

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**BILL SUMMARY**

- Prohibits the state from awarding a public improvement contract unless its terms require the contractor, each subcontractor, and each lower-tier subcontractor to be enrolled in and be in good standing in the Bureau of Workers' Compensation's Drug-Free Workplace Program ("DFWP") or a comparable program approved by the Bureau.
- Specifies the requirements that an employer's DFWP must include to be approved by the Bureau as a comparable program.
- Requires a contracting authority to verify a bidder's enrollment in and good standing in a DFWP prior to awarding a public improvement contract to the bidder.
- States that the failure of a contractor or subcontractor to require a subcontractor or lower-tier subcontractor be enrolled in and be in good standing in a DFWP will result in the contractor or subcontractor being in breach of contract.
- Requires that a breach of contract be used in the responsibility analysis of the contractor or the subcontractor who was not enrolled in a program or the subcontractor or the lower-tier subcontractor who was not enrolled in

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*\* This analysis was prepared before the report of the Senate Insurance, Commerce, and Labor Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

a program for future contracts with the state for five years after the date of the breach.

- Prohibits a contracting authority from awarding a contract for construction manager services to a construction manager who intends and is authorized to provide labor for a public improvement contract if the construction manager is not enrolled in or in good standing in a DFWP.

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## CONTENT AND OPERATION

### **Requirement that a contractor participate in a drug-free workplace program**

The bill prohibits a contracting authority<sup>1</sup> from awarding a public improvement contract to a contractor unless the terms of the contract contain both of the following: (1) a requirement that the contractor to be enrolled in and be in good standing in the Drug-Free Workplace Program ("DFWP") of the Bureau of Workers' Compensation ("BWC") or a comparable program that the BWC approves and that meets the bill's requirements described under "**Requirements for a comparable DFWP**," below, and (2) four specific statements regarding the enrollment of subcontractors and lower-tier subcontractors in a DFWP as described under "**Requirement that subcontractors and lower-tier subcontractors participate in a DFWP**," below. A contracting authority must ensure that money appropriated by the General Assembly for its public improvement contract, or in the case of a state institution of higher education, its financing for the public improvement contract is not expended unless each contractor for that contract is enrolled in and in good standing in such a program. Prior to awarding a contract to a bidder, a contracting authority must verify that the bidder is enrolled and in good standing in such a program. (R.C. 153.03(B) and (D).)

### **Requirements for a comparable DFWP**

Under the bill, a comparable DFWP approved by the BWC must require that the employer do all of the following:

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<sup>1</sup> *The bill defines "contracting authority" as any state agency or other state instrumentality that is authorized to award a public improvement contract (R.C. 153.03(A)). Although the bill applies to state contracting authorities generally, some state authorities are exempt from the Public Improvements Law (Chapter 153. of the Revised Code) and thus would be exempt from the bill's requirements. Some examples of the exempted authorities include the Capitol Square Review and Advisory Board and the Ohio Cultural Facilities Commission (for certain contracts) (R.C. 105.41, 3383.07, and 3383.08, not in the bill).*

(1) Develop, implement, and provide to all employees a written substance use policy that conveys full and fair disclosure of the employer's expectations that no employee be at work with alcohol or drugs in the employee's system, and specifies the consequences for violating the policy.

(2) Conduct drug and alcohol tests on employees under specified conditions.

(3) Use the specified types of tests when conducting a drug or alcohol test on an employee.

(4) Require all employees to receive at least one hour of training that increases awareness of and attempts to deter substance abuse and supplies information about employee assistance to deal with substance abuse problems, and require all supervisors to receive one additional hour of training in skill building to teach a supervisor how to observe and document employee behavior and intervene when reasonable suspicion exists of substance use.

(5) Require all supervisors and employees to receive the training described in (4) above before work for a public improvement contract commences or during the term of a public improvement contract.

(6) Require that the training described in (4) above be provided using material prepared by an individual who has credentials or experience in substance abuse training.

(7) Assist employees by providing, at a minimum, a list of community resources from which an employee may obtain help with substance abuse problems, except that this requirement does not preclude an employer from having a policy that allows an employer to terminate an employee's employment the first time the employee tests positive for drugs or alcohol or if an employee refuses to be tested for drugs, alcohol, or both. (R.C. 153.03(B)(2).)

**Conditions under which an employer must conduct drug and alcohol tests**

For the purposes of (2) directly above, an employer must conduct drug and alcohol tests on employees under the following conditions:

(a) Prior to an individual's employment or during an employee's probationary period for employment, which must not exceed 120 days after the probationary period begins;

(b) At random intervals while an employee provides labor or onsite supervision of labor for a public improvement contract;

(c) After an accident at the site where labor is being performed pursuant to a public improvement contract;

(d) When the employer or a construction manager has reasonable suspicion that prior to an accident an employee may be in violation of the employer's written substance use policy;

(e) Prior to an employee returning to a work site to provide labor for a public improvement contract after the employee tested positive for drugs or alcohol, and again after the employee returns to that site to provide labor under that contract, as required by either the employer, the construction manager, or conditions in the contract. (R.C. 153.03(B)(2)(b).)

For the purposes of (b) directly above, the employer must use the neutral selection procedures required by the U.S. Department of Transportation ("USDOT") to determine which employees to test and when to test those employees.

For purposes of (c) and (d) immediately above, "accident" and "reasonable suspicion" have the meanings established in rules the Administrator of Workers' Compensation adopts pursuant to the Workers' Compensation Law (R.C. Chapters 4121. and 4123.) for the BWC's DFWP, as those rules exist on the bill's effective date. (See **COMMENT** for explanation of current BWC administrative rules that define "accident" and "reasonable suspicion.")

**Required tests to use when testing an employee**

For the purposes of (3) under "**Requirements for a comparable DFWP,**" above, an employer must use the following types of tests when conducting a drug or alcohol test under the bill:

(1) Drug and alcohol testing that uses the federal testing model that the Administrator has incorporated into the BWC's drug-free workplace program;

(2) Testing to determine whether the concentration of alcohol on an employee's breath is equal to or in excess of the level specified in the Operation of Motor Vehicles Law (R.C. Chapter 4511.) for the concentration of alcohol on a person's breath,<sup>2</sup> which is obtained through an evidentiary breath test conducted by

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<sup>2</sup> *The Operation of Motor Vehicles Law specifies two levels for the concentration of alcohol on a person's breath: (1) .08 per one gram or more but less than .17 of one gram by weight of alcohol per 210 liters of the person's breath, or (2) more than a concentration of .17 of one gram or more by weight of alcohol per 210 liters of the person's breath (R.C. 4511.19(A)(1)(d) or (h)).*

a breath alcohol technician using breath testing equipment that meets standards established by the USDOT, or, if such technician and equipment are unavailable, a blood test may be used to determine whether the concentration of alcohol in an employee's blood is equal to or in excess of the level specified in the Operation of Motor Vehicles Law.<sup>3</sup> (R.C. 153.03(B)(2)(c).)

Under the bill, any time the U.S. Department of Health and Human Services changes the federal testing model that the Administrator has incorporated into the BWC's drug-free workplace program in a manner that allows additional or new products, protocols, procedures, and standards in the model, the Administrator may adopt rules establishing standards to allow employers to use those additional or new products, protocols, procedures, or standards to satisfy the requirements of (1) and (2) directly above, and the BWC may approve an employer's DFWP that meets the Administrator's standards and the other requirements specified under "*Requirements for a comparable DFWP*," above (R.C. 153.03(C)).

***Requirement that subcontractors and lower-tier subcontractors participate in a DFWP***

The bill requires the following two statements be included in the public improvement contract entered into between the contracting authority and a contractor for the public improvement:

(1) "Each contractor shall require all subcontractors with whom the contractor is in contract for the public improvement to be enrolled in and be in good standing in the Bureau of Workers' Compensation's Drug-Free Workplace Program or a comparable program approved by the Bureau that meets the requirements specified in section 153.03 of the Revised Code prior to a subcontractor providing labor at the project site of the public improvement."

(2) "Failure of a contractor to require a subcontractor to be enrolled in and be in good standing in the Bureau of Workers' Compensation's Drug-Free Workplace Program or a comparable program approved by the Bureau that meets the requirements specified in section 153.03 of the Revised Code prior to the time that the subcontractor provides labor at the project site will result in the contractor being found in breach of the contract and that breach shall be used in the responsibility analysis of the contractor or the subcontractor who was not enrolled

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<sup>3</sup> *The Operation of Motor Vehicles Law specifies two levels for concentration of alcohol in a person's whole blood: (1) .08 of 1% or more but less than .17 of 1% by weight per unit volume of alcohol, or (2) .17 of 1% or more by weight per unit volume of alcohol (R.C. 4511.19(A)(1)(b) or (f)).*

in a program for future contracts with the state for five years after the date of the breach."

The bill also requires the contracting authority to include in the contract two similar statements regarding each subcontractor and each lower-tier subcontractor with whom a subcontractor contracts for that public improvement. (R.C. 153.03(E).)

**Requirement for a construction manager to participate in a drug-free workplace program**

The bill defines "construction manager" as a person with substantial discretion and authority to plan, coordinate, manage, and direct all phases of a project for the construction, demolition, alteration, repair, or reconstruction of any public building, structure, or other improvement. Under the bill, in the event a construction manager intends and is authorized to provide labor for a public improvement contract, a contracting authority must verify, prior to awarding a contract for construction management services, that the construction manager was enrolled in and in good standing in a DFWP described in the bill prior to entering into the public improvement contract. The bill prohibits the contracting authority from awarding a contract for construction manager services to a construction manager if the construction manager is not enrolled in or in good standing in such a program. (R.C. 153.03(F).)

**Definitions**

The bill also defines the following terms:

(1) "Contractor" means any person with whom a contracting authority has entered into a public improvement contract to provide labor for a public improvement.

(2) "Bidder" means a person who submits a bid to a contracting authority to perform work under a public improvement contract.

(3) "Subcontractor" means any person who undertakes to provide any part of the labor on the site of a public improvement under a contract with any person other than the contracting authority, including all such persons in any tier.

(4) "Labor" means any activity performed by a person that contributes to the direct installation of a product, component, or system, or that contributes to the direct removal of a product, component, or system.

(5) "Public improvement contract" means any contract that is financed in whole or in part with money appropriated by the General Assembly, or that is

financed in any manner by a contracting authority, and that is awarded by a contracting authority for the construction, alteration, or repair of any public building, public highway, or other public improvement.

(6) "State agency" means every organized body, office, or agency established by Ohio law for the exercise of any function of state government (R.C. 153.03(A)).

### **Statement of legislative intent**

The bill states that the General Assembly intends the drug-free workplace programs required by the bill to be limited to the constructing, altering, or repairing of public improvements of the state and to be of assistance in ensuring that such public improvements of the state are constructed, altered, or repaired in a manner that protects the safety of Ohio's citizens (R.C. 153.031).

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## **COMMENT**

Currently, "accident" is defined as "an unplanned, unexpected, or unintended event which occurs on the employer's property, during the conduct of the employer's business, or during working hours, or which involves employer-supplied motor vehicles or motor vehicles used in conducting the employer's business, or within the scope of employment, and which results in any of the following:

- (a) A fatality of anyone involved in the accident;
- (b) Bodily injury requiring off-site medical attention away from the employer's place of employment;
- (c) Vehicular damage in apparent excess of a dollar amount stipulated in the employer's DFWP policy; or
- (d) Non-vehicular damage in apparent excess of a dollar amount stipulated in the employer's DFWP policy."

The administrative rule specifies that "accident" does not have the same meaning as provided in the Workers' Compensation Law (R.C. 4123.01(C)), and the definition of accident used in the rule is not intended to modify the definition of a compensable injury under the Workers' Compensation Law. (O.A.C. 4123-17-58.)

Currently, under the Administrator's rules, "reasonable suspicion" means "evidence that an employee is using drugs or alcohol in violation of the company's

DFWP policy, drawn from specific, objective facts and reasonable inferences drawn from these facts in light of experience and training. Such facts and inferences may be based on, but are not limited to, any of the following:

(a) Observable phenomena, such as direct observation of drug or alcohol use, possession or distribution, or the physical symptoms of being under the influence of drugs or alcohol, such as but not limited to slurred speech, dilated pupils, odor of alcohol or marijuana, changes in affect, dynamic mood swings, etc.;

(b) A pattern of abnormal conduct, erratic or aberrant behavior, or deteriorating work performance (e.g., frequent absenteeism, excessive tardiness, recurrent accidents) which appears to be related to substance abuse and does not appear to be attributable to other factors;

(c) The identification of an employee as the focus of a criminal investigation into unauthorized drug possession, use, or trafficking;

(d) A report of alcohol or other drug use provided by a reliable and credible source;

(e) Repeated or flagrant violations of the company's safety or work rules, which are determined by a supervisor to pose a substantial risk of physical injury or property damage and which appear to be related to substance abuse or substance use that may violate the employer's DFWP policy, and do not appear attributable to other factors." (O.A.C. 4123-17-58.)

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## HISTORY

ACTION	DATE
Introduced	02-23-05
Reported, H. Commerce & Labor	03-15-06
Passed House (96-0)	03-22-06
Reported, S. Insurance, Commerce, & Labor	---

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