



# Ohio Legislative Service Commission

## Bill Analysis

Audra Tidball

### **H.B. 298**

131st General Assembly  
(As Introduced)

**Reps.** Schaffer and Maag, Antani, Becker, Blessing, Boose, Buchy, Ginter, Grossman, Hayes, Hood, T. Johnson, Koehler, Reineke, Retherford, Slaby, Sprague, Vitale

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## **BILL SUMMARY**

### **Drug testing applicants for cash assistance**

- Requires the Director of Job and Family Services to establish a drug testing pilot program for Ohio Works First (OWF) in three counties.
- Requires the county department of job and family services (CDJFS) of a participating county to conduct an assessment of each adult member of an assistance group that applies for OWF to determine whether there is reasonable cause to suspect that an adult member has a chemical dependency.
- Requires an adult to undergo a drug test if an assessment reveals a reasonable cause to suspect that the adult has a chemical dependency.
- Makes an adult undergoing a drug test responsible for the test's cost if the adult fails the drug test.
- Requires a participating county's CDJFS to refer an adult who fails a drug test to a board of alcohol, drug addiction, and mental health services and requires the board to refer an adult who requests services to a certified community addiction services provider.
- Provides for an assistance group's OWF cash assistance to be provided to a protective payee for one year if an adult member refuses to cooperate with a chemical dependency assessment, refuses to undergo a drug test when required to do so, or fails a drug test.
- Requires the Director of Job and Family Services to prepare a report on the pilot program.

- Makes an appropriation.

### **Drug testing applicants for unemployment benefits**

- Requires the Director to require an individual who has applied for unemployment benefits to take and pass a drug test to be eligible for unemployment benefits under certain circumstances.
- Requires the Director to adopt rules that the Director considers necessary for the administration of the bill's provisions regarding the drug testing of unemployment benefit applicants.

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## **CONTENT AND OPERATION**

### **Ohio Works First Drug Testing Pilot Program**

The bill requires the Director of Job and Family Services to establish a drug testing pilot program for Ohio Works First (OWF). OWF is a public assistance program that provides cash assistance to low-income families with children. OWF is funded in part with federal funds provided under the Temporary Assistance for Needy Families (TANF) block grant. OWF is also funded with state and county funds.

The Director must establish the OWF drug testing pilot program not later than 90 days after the bill's effective date. The pilot program is to be operated for two years in three counties. The Director is to select the counties, but may select a county only if the county's board of county commissioners volunteers to have the county participate. The Director must strive to have one rural, one suburban, and one urban county included in the program.<sup>1</sup>

#### **Assessment of adult assistance group members**

The county department of job and family services (CDJFS) of each county participating in the pilot program is to conduct an assessment of each adult member of an assistance group that applies to participate in OWF. The bill defines "assistance group" as a group of individuals treated as a unit for purposes of determining eligibility for, and the amount of assistance provided under, OWF.<sup>2</sup> The purpose of the assessment is to determine whether there is reasonable cause to suspect that any of the adults have a chemical dependency.<sup>3</sup> The bill provides that an adult has a chemical

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<sup>1</sup> Section 3(B).

<sup>2</sup> Section 3(A)(1), referencing R.C. 5107.02, not in the bill.

<sup>3</sup> Section 3(B).

dependency if the adult uses a drug of abuse to the extent that the adult becomes physically or psychologically dependent on the drug or endangers the adult's health, safety, or welfare or that of others.<sup>4</sup> The following are considered drugs of abuse:<sup>5</sup>

(1) A drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V. (Drugs are included in the schedules based on their potential for abuse. Those in schedules II, III, and IV can be legally obtained only pursuant to a prescription. No prescriptions may be written for schedule I drugs.)<sup>6</sup>

(2) A harmful intoxicant (i.e., any compound, mixture, preparation, or substance, other than beer or intoxicating liquor, the gas, fumes, or vapor of which when inhaled can induce intoxication, excitement, giddiness, irrational behavior, depression, stupefaction, paralysis, unconsciousness, asphyxiation, or other harmful physiological effects);

(3) A drug considered a dangerous drug under Ohio's pharmacy law.

The assessment must be conducted in accordance with rules the Director of Job and Family Services is to adopt. The assessment is to be part of the process of determining whether the assistance group is initially eligible to participate in OWF. The bill prohibits an assessment from being conducted as part of an OWF eligibility redetermination.<sup>7</sup>

### **Drug test**

A CDJFS must require an adult member of an assistance group to undergo a drug test if an assessment reveals a reasonable cause to suspect that the adult has a chemical dependency.<sup>8</sup> The drug test is to consist of either a chemical test of the adult's urine, or an oral fluid test that uses a swab, and is to determine whether a drug of abuse is present in the biological specimen taken from the adult's body.<sup>9</sup> The CDJFS is to

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<sup>4</sup> Section 3(A)(2).

<sup>5</sup> Section 3(A)(3), referencing R.C. 3719.011, not in the bill.

<sup>6</sup> U.S. Department of Justice, Drug Enforcement Administration, Office of Diversion Control, *Practitioner's Manual – Section V (Valid Prescription Requirements)* (last visited November 3, 2015), available at <http://www.deadiversion.usdoj.gov/pubs/manuals/pract/section5.htm>.

<sup>7</sup> Section 3(B) and (H).

<sup>8</sup> Section 3(B).

<sup>9</sup> Section 3(A)(4).

determine which type of test to use. An adult undergoing the drug test is responsible for its cost if the adult fails the drug test.<sup>10</sup>

### **Referrals to treatment programs**

A CDJFS must refer an adult member of an assistance group who fails a drug test to the board of alcohol, drug addiction, and mental health services that serves the same county as the CDJFS. If the adult, acting on the referral, requests services from the board, the board must refer the adult to a community addiction services provider certified by the Department of Mental Health and Addiction Services.<sup>11</sup>

Under the bill, an adult fails a drug test if the test reveals the presence of a drug of abuse in a biological specimen taken from the adult's body. However, the adult is not to be considered to have failed a drug test if the adult obtained the drug pursuant to a prescription and injected, ingested, or inhaled the drug in accordance with the prescriber's directions.<sup>12</sup>

### **OWF payments to a protective payee**

The bill requires that an assistance group's OWF cash assistance be provided to a protective payee approved by the appropriate CDJFS if an adult member of the assistance group refuses to cooperate with an assessment conducted under the pilot program, refuses to undergo a drug test when required to do so under the pilot program, or fails a drug test conducted under the pilot program. A protective payee may not be a member of the assistance group. The protective payee must act as a representative of the assistance group and manage the assistance group's cash assistance on behalf of the assistance group. Except as discussed below (see "**Early termination of penalty**," below), the assistance group's cash assistance must be provided to the protective payee for one year. After one year, the cash assistance must be provided to the assistance group, unless OWF rules adopted under existing law provide for the cash assistance to be provided to a protective payee due to another circumstance.<sup>13</sup>

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<sup>10</sup> Section 3(G).

<sup>11</sup> Section 3(D).

<sup>12</sup> Section 3(A)(5).

<sup>13</sup> Section 3(C); R.C. 5107.05, not in the bill.

### **Early termination of penalty**

The bill authorizes an adult member who causes an assistance group's OWF cash assistance to be provided to a protective payee to request, not sooner than six months after the cash assistance begins to be provided to the protective payee, to have the cash assistance be provided to the assistance group instead. The adult member must include with the request documentation that is acceptable to the CDJFS and shows that the adult member successfully completed the treatment provided by the community addiction services provider to which the adult member was referred (see "**Referrals to treatment programs**," above). The CDJFS may approve the request if the adult member undergoes a drug test and passes it. The CDJFS must disapprove the request, however, if OWF rules adopted under existing law provide for the cash assistance to be provided to a protective payee due to another circumstance. If the adult member fails to undergo a drug test or fails the drug test, the cash assistance must continue to be provided to the protective payee for an additional year beginning on the date that is 12 months after the date that the cash assistance first began to be provided to the protective payee.<sup>14</sup>

### **Payments following termination of the pilot program**

The bill specifies that an assistance group's OWF cash assistance must be provided to a protective payee for the applicable period specified in the bill regardless of whether that period extends beyond the date the pilot program ends.<sup>15</sup>

### **Compliance with OWF requirements**

The bill specifies that the provision of an assistance group's OWF cash assistance to a protective payee does not excuse the members of the assistance group or any work-eligible individuals from compliance with any of the OWF requirements applicable to them.<sup>16</sup> Under federal TANF regulations, a work-eligible individual includes a parent who does not receive TANF assistance but lives with a child receiving TANF assistance unless the parent is (1) a minor who is not the head of household, (2) a noncitizen who is ineligible to receive assistance due to immigration status, (3) a recipient of Supplemental Security Income benefits or Social Security Disability Insurance benefits (this is at the option of the state and on a case-by-case basis), or (4) providing care for a disabled family member living in the home if there is medical documentation to

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<sup>14</sup> Section 3(D).

<sup>15</sup> Section 3(E).

<sup>16</sup> Section 3(F).



support the need for the member to remain in the home to care for the disabled family member.<sup>17</sup>

## **Rules**

The bill requires the Director of Job and Family Services to adopt rules as necessary to implement the pilot program, including rules governing chemical dependency assessments of each adult member of an assistance group. The rules are to be adopted in accordance with the Administrative Procedure Act (R.C. Chapter 119.).<sup>18</sup>

## **Report**

The bill requires the Director of Job and Family Services to prepare a report regarding the pilot program. The report must include all of the following information:

(1) The number of adults for whom assessments reveal a reasonable cause to suspect they have a chemical dependency;

(2) The number of adults required to undergo drug tests;

(3) The number of adults who fail drug tests;

(4) The costs of the drug tests;

(5) The total amount of time that OWF cash assistance is provided to protective payees under the pilot program as of the date the report is prepared;

(6) Regarding the adults who are referred to a community addiction services provider: (a) how many complete the treatment, (b) how many are employed as of the date the report is prepared, and (c) in the case of the adults who are not employed at the time they complete the treatment but become employed by the date the report is prepared, the average number of months it takes to become employed.

The CDJFS of each county participating in the pilot program must provide any information the Director needs to prepare the report. Not later than 90 days after the pilot program's conclusion, the Director must submit the report to the Governor, Senate President, Senate Minority Leader, Speaker of the House of Representatives, House Minority Leader, and Director of the Legislative Service Commission.<sup>19</sup>

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<sup>17</sup> 45 Code of Federal Regulations 261.2(n).

<sup>18</sup> Section 3(H).

<sup>19</sup> Section 3(I).

## Drug testing applicants for unemployment benefits

The bill disqualifies an individual from receiving unemployment benefits if the individual fails or refuses to take a drug test if required to do so by the bill.<sup>20</sup> Under the bill, the Director, who administers and enforces Ohio's Unemployment Compensation Law, must require an individual who has applied for unemployment benefits to take a drug test as part of the individual's benefits eligibility determination (see "**Unemployment eligibility – current law**," below) under certain circumstances. The Director must require a drug test if the Director has reasonable cause to suspect that the individual has engaged in the unlawful use of a controlled substance and the Director has determined that either of the following applies to the individual:

(1) 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 filing an initial application for unemployment benefits to disclose this information);<sup>21</sup>

(2) The individual is one for whom suitable work is only available in an occupation that the U.S. Department of Labor, the federal agency in charge of approving state unemployment compensation systems, has determined, by final rule, is an occupation that regularly conducts drug testing (see **COMMENT**).<sup>22</sup>

Continuing law does not define "suitable work" for purposes of receiving regular unemployment benefits. Under continuing law, to determine whether work is suitable, the Director considers the degree of risk to the individual's health, safety, and morals, the individual's physical fitness for the work, the individual's prior training and experience, the length of the individual's unemployment, the distance of the available work from the individual's residence, and the individual's prospects for obtaining local work.<sup>23</sup>

An individual who is required by the bill to submit to a drug test, who refuses to take the test or fails, is ineligible to serve a waiting period or be paid benefits for the duration of the individual's unemployment.<sup>24</sup> A drug test under the unemployment provisions is similar to the drug test under the pilot program described above, except

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<sup>20</sup> R.C. 4141.29(D).

<sup>21</sup> R.C. 4141.28(B)(2).

<sup>22</sup> R.C. 4141.294(B).

<sup>23</sup> R.C. 4141.29(F).

<sup>24</sup> R.C. 4141.29(D)(2) and 4141.294(C).

that it tests for the presence of a controlled substance. "Controlled substance" means a substance listed on a schedule established under the federal Controlled Substances Act. Similar to the pilot program, an individual fails a drug test if the test reveals the presence of a controlled substance unless the individual obtained the controlled substance pursuant to a prescription and the individual took the drug in accordance with the prescriber's directions.<sup>25</sup>

The bill requires the Director to ensure that drug tests conducted under the bill 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 also must adopt any rules the Director considers necessary for the administration of the bill's drug testing requirements for unemployment benefit applicants.<sup>26</sup>

### **Unemployment eligibility – current law**

The Unemployment Compensation Law specifies certain conditions that an individual must satisfy and procedures the individual must follow to qualify for unemployment benefits. It also outlines conditions under which an individual who loses a job is disqualified from receiving benefits and specifies conditions under which that individual may remove the disqualification. Generally, an individual qualifies for benefits if the individual files a valid application for benefits (the initial application), makes a proper claim for benefits, registers at an employment office, and is available and actively searching for work.

An application for determination of benefit rights is valid if all of the following apply to the individual:

- (1) The individual is unemployed;
- (2) The individual was separated for a nondisqualifying reason;
- (3) The individual previously was employed by an employer who is subject to the Unemployment Compensation Law in at least 20 qualifying weeks within the individual's base period;

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<sup>25</sup> R.C. 4141.294(A).

<sup>26</sup> R.C. 4141.294(D).



(4) The individual has earned or been paid during those qualifying weeks remuneration at an average weekly wage of not less than 27.5% of the statewide average weekly wage (recalculated each calendar year; currently \$237 for 2015<sup>27</sup>).

A "qualifying week" generally is any calendar week in an individual's base period with respect to which the individual earns or is paid remuneration in employment subject to the Unemployment Compensation Law. An individual's "base period" is the first four of the last five completed calendar quarters immediately preceding the first day of the individual's benefit year (generally the 52-week beginning with the first day of the week with respect to which the individual first files a valid application for determination of benefit rights), except that if an individual does not have sufficient qualifying weeks and wages in the base period to qualify for benefit rights, the individual's base period is the four most recently completed calendar quarters preceding the first day of the individual's benefit year, which is referred to as the "alternate base period."<sup>28</sup>

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## COMMENT

### Drug testing applicants for cash assistance

Federal law authorizes states to test welfare recipients for illegal drug use,<sup>29</sup> but such a law must be consistent with the Fourth Amendment to the U.S. Constitution's prohibition against unreasonable searches and seizures. Two federal courts of appeal have held that random, suspicionless drug testing of welfare applicants or recipients violates the Fourth Amendment.<sup>30</sup> Federal courts have not determined whether suspicion-based drug testing, such as is required by the bill, is constitutional.

### Drug testing applicants for unemployment benefits

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

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<sup>27</sup> Ohio Department of Job and Family Services, Unemployment Compensation FAQs, [http://jfs.ohio.gov/unemp\\_comp\\_faq/faq\\_elig\\_definitions2.stm#average\\_weekly\\_wage](http://jfs.ohio.gov/unemp_comp_faq/faq_elig_definitions2.stm#average_weekly_wage) (accessed November 2, 2015).

<sup>28</sup> R.C. 4141.01(O)(1), (Q), and (R), not in the bill.

<sup>29</sup> 21 United States Code (U.S.C.) 862b.

<sup>30</sup> *Marchwinski v. Howard*, 60 Fed. Appx. 601 (6th Cir. 2003); *Lebron v. Fla. D.C.F.*, 772 F.3d 1352, 1355 (11th Cir. 2014).

system. Federal law limits the circumstances in which an unemployment benefit applicant may be drug tested.<sup>31</sup>

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.<sup>32</sup> With respect to the second potential reason in which an individual may be tested, the U.S. Department of Labor has not yet adopted a final rule to identify occupations that regularly conduct drug testing.<sup>33</sup>

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## HISTORY

### ACTION

### DATE

Introduced

08-05-15

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<sup>31</sup> 42 U.S.C. 503.

<sup>32</sup> R.C. 4141.29(D)(2)(a).

<sup>33</sup> See U.S. Department of Labor, Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants [10/9/2014], <http://webapps.dol.gov/federalregister/HtmlDisplay.aspx?DocId=27850&AgencyId=15&DocumentType=1> (accessed November 2, 2015).

