



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #370

FoodShare Employment and Training Drug Testing (Health Services -- Medical Assistance -- Administration)

[LFB 2015-17 Budget Summary: Page 231, #7]

CURRENT LAW

FoodShare and FSET. FoodShare is Wisconsin's name for the federal supplemental nutrition assistance program (SNAP), which provides federally-funded benefits to low-income households to buy food. The program is administered jointly by the U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS), the Wisconsin Department of Health Services (DHS), and local income maintenance consortia and tribes. The FoodShare Employment and Training (FSET) program provides education, skills, and work experience to enable FoodShare recipients to obtain competitive employment and enhance earning potential. Any adult FoodShare enrollee may participate in the FSET program, including certain able-bodied adults without dependents (ABAWDs), who may participate in FSET to fulfill the ABAWD work requirements and maintain eligibility for FoodShare benefits.

Drug Testing FoodShare Applicants and Recipients. Federal law prohibits state agencies from imposing any standards of eligibility, other than those specified in federal law, as a condition of participation in SNAP. Consequently, states may not consider an individual's failure to comply with a drug screen or test or the results of any drug screen or test in determining eligibility for SNAP benefits.

GOVERNOR

Require DHS to request a waiver from the USDA to screen FSET participants for illegal use of controlled substances without a valid prescription, and, if indicated, test, as specified by DHS in the waiver request, FSET participants for illegal use of controlled substances without presenting evidence of a valid prescription. If such a waiver is granted and in effect, require DHS to screen and, if indicated, test FSET participants in accordance with the waiver granted by the

USDA. Require DHS to include in its 2017-19 budget request an estimate of the future fiscal effect of the program, if a waiver is approved by the USDA during the 2015-17 biennium.

DISCUSSION POINTS

1. The FSET program focuses on identifying the strengths, needs, and preferences of job seekers and offering individualized services to improve job-seeking skills and increase employment opportunities. Services provided under the FSET program include job search activities, education and vocational training, workfare and work experience, self-employment, and job retention services. During the five-year period from calendar year 2009 through 2013, the most recent year for which data is available, average monthly enrollment in the program ranged from approximately 5,100 to 6,000. During this period, no FSET participants were subject to work requirements.

2. Under the work requirements enacted in 2013 Act 20, ABAWDs ages 18 to 49 who are able to work, not residing in a household with a child under age 18, and not pregnant, must meet one of the following requirements to maintain eligibility for FoodShare benefits beyond three months in a 36-month period: (a) work for 20 hours per week; (b) participate in a qualifying employment and training program for at least 20 hours per week; or (c) work or participate in an employment training program for a total of at least 20 hours per week. Non-exempt ABAWDs may participate in the FSET program as a means by which to comply with the FoodShare work requirements.

3. The FoodShare work requirements were implemented in Kenosha, Racine, and Walworth counties on July 1, 2014, and in the remainder of the state on April 1, 2015. Due to the new work requirements, total enrollment in FSET is anticipated to increase to an average of approximately 37,200 individuals per month in 2015-16 and approximately 42,500 individuals per month in 2016-17. Under the bill, this population would potentially be required to submit to drug screening and testing.

4. Under the bill, if the state's waiver request were approved, DHS could screen and, if indicated, test, any FSET participant for the illegal use of a controlled substance without a valid prescription. However, the bill does not specify how an approved waiver agreement would be implemented, including: (a) whether all FSET recipients would be screened, and how frequently they would be screened; (b) what, if any, potential consequences would result to the recipient for failure to submit to a screen or test; and (c) what role, if any, local IM agencies or counties would have in administering, enforcing, or funding the terms of any approved waiver agreement.

5. The Department of Administration (DOA) indicates that this proposal is designed to identify individuals who need treatment to address substance abuse issues that may be barriers to their entering the workforce. However, the administration has not yet determined: (a) what services would be offered to individuals who fail a drug test; (b) how these services would be funded; and (c) whether an individual identified as needing substance abuse services would be penalized for refusing or not complying with a treatment plan. DOA indicates that these matters would be resolved as the waiver application is developed and through negotiations with FNS.

Drug Testing of FoodShare Applicants with Drug-Related Felonies

6. Under provisions enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), federal law permanently disqualifies applicants with a felony drug conviction from receiving benefits under SNAP or the Temporary Assistance to Needy Families (TANF) program. However, PRWORA permits a state to provide SNAP and TANF benefits to convicted felons if a state enacts legislation authorizing benefits to these individuals.

7. Wisconsin has enacted such legislation. Under the state's FoodShare statutes, when applying for FoodShare, an applicant must state in writing whether the applicant or any member of the applicant's household has been convicted in any state or federal court of a felony that has an element of possession, use, or distribution of a controlled substance. If the applicant or a member of the applicant's household was convicted of such an offense within five years prior to when the written statement is made, DHS must require that individual to submit to a test for the use of controlled substances as a condition of continued eligibility. The state-run Milwaukee Enrollment Services (MilES) that oversees FoodShare enrollment in the Milwaukee area estimates the cost of this policy to be approximately \$33 per drug test.

8. Under this policy, if an individual has a positive drug test result, the individual fails the drug test and he or she is ineligible for FoodShare for 12 months. However, DHS must consider the income and resources of that individual to be available to the household in determining FoodShare benefits. The individual must submit to and pass a drug test to be eligible for FoodShare following the 12-month sanction period. If an individual refuses to test, he or she is ineligible until submitting to the drug test. The following table shows the drug testing results of the individuals who were subject to a drug test under this policy for 2009-10 through 2013-14.

FoodShare Drug Felon Drug Test Results FY 2009-10 through 2013-14

	Number Subject to Test	Positive (Failed)	Negative (Passed)	Refused to Test
2009-10	973	2.5%	91.7%	5.9%
2010-11	1,426	4.4	90.9	4.7
2011-12	1,762	4.5	86.4	9.1
2012-13	2,612	5.4	87.1	7.5
2013-14	3,586	6.6	86.4	7.1

9. According to the Department's 2014 Wisconsin Epidemiological Profile on Alcohol and Other Drug Use, the average drug use of Wisconsin residents in the past month in 2011 and 2012 for individuals age 12 and older was approximately 9% for any illicit drugs and 7% for marijuana. Because drug testing of drug felons in the FoodShare program suggests that such persons are no more likely than the general population to use drugs, it appears unlikely that applicants for FoodShare use drugs at a higher rate than the general population. Further, it appears that such

applicants are no more likely to be unemployed due to drug abuse, and that there may not be a need to incur expenses to test such persons for drug use.

10. On the other hand, the data provided regarding drug testing of drug felons does not account for the drug status of those who refused a drug test or delayed taking the test. It is possible that some drug felons know that a drug test would be positive and, therefore, do not submit to drug testing or strategically time their application to avoid detection of their drug use.

11. In summary, the limited information available on drug testing of felons convicted of drug offenses who are seeking enrollment in FoodShare may not be useful in assessing the likelihood of drug abuse among individuals participating in the FSET program.

Privacy, Unreasonable Searches, and Federal SNAP Eligibility Requirements

12. Drug tests are generally considered searches for the purposes of the Fourth Amendment of the U.S. Constitution and Section 11 of the Wisconsin Constitution. Historically, courts have found that, in order for a search to be reasonable, the search must be based upon individualized suspicion, special need, or important governmental interest, which goes beyond the need for law enforcement, such as public safety.

13. No state has attempted to implement a drug testing policy on a similar SNAP employment and training program. Several states have, however, attempted to implement a drug testing policy on other welfare benefits, including TANF, as well as on SNAP benefits beyond the federally-permitted drug felon drug testing policy. In Florida, which implemented a drug testing policy for all TANF recipients, a district judge struck down the policy for violating constitutional protections against unreasonable searches because it was not clear that impoverished individuals were any more likely to be drug users than the general population. This ruling was upheld by a U.S. Circuit Court of Appeals.

14. In Georgia, which implemented a suspicion-based drug testing policy for SNAP recipients, FNS required the state to remove this requirement because it was considered an additional condition of eligibility for SNAP benefits, which is prohibited under federal SNAP regulations.

15. It is not known whether the same prohibitions that have applied to these drug testing policies enacted in other states would apply to the Governor's proposed FSET drug testing policy for several reasons. First, the Governor's proposal is suspicion-based, in that it would require a positive screen to administer a drug test, so it is not known whether a court would consider it an unreasonable search.

16. Second, participation in the FSET program is voluntary, rather than required, to remain eligible for FoodShare benefits. However, as a practical matter, participation in FSET may be the only way some nonexempt ABAWDs can comply with work requirements, and thereby retain FoodShare benefits. Nonetheless, because the bill does not specify consequences with respect to FoodShare or FSET enrollment associated with a positive test result, it is not known whether FNS would consider this provision an additional condition of eligibility for Wisconsin's SNAP program.

17. DOA notes that an ABAWD who is participating in an alcohol or drug addiction treatment program is exempt from the FoodShare ABAWD work requirement that is otherwise a condition of eligibility. Therefore, the administration argues that this requirement is not imposing an additional FoodShare eligibility criterion on this group because those individuals would not need to participate in the FSET program to maintain eligibility for FoodShare.

However, this argument is based on the assumption that individuals who are screened, tested, and had a positive result would be offered some sort of drug addiction services under this provision. The bill does not include provisions relating to substance abuse treatment for individuals with a positive test result.

Discussion of Alternatives

18. The goal of the FSET program is to prepare individuals for and assist them in securing suitable employment. Because some private employment arrangements are conditioned on an individual's ability to pass a drug test, some may argue that this provision is keeping with the intent of the FSET program, and should thus be incorporated into the program. Further, an argument could be made that public assistance recipients should be drug tested to deter those individuals from drug use, increase employability, and decrease dependence on public assistance benefits. Additionally, some may argue that recipients of welfare benefits should be drug tested to ensure that public benefits are funding the purposes for which they are provided, such as employment and training services, rather than to support drug use. Accordingly, the Committee may choose to adopt the Governor's recommendation (Alternative 1), in that it may be seen as keeping with the stated goal of the FSET program.

19. The Committee could also consider modifying the provision to more clearly specify the conditions of the waiver that DHS would be required to request. For example, the Committee could amend the provision by adopting one or more of the following modifications: (a) limiting the applicability to FSET participants who are subject to work requirements (Alternative 2a); (b) specifying that an individual's refusal to submit to a drug screen or test would not affect the individual's eligibility for FoodShare benefits or FSET services (Alternative 2b); or (c) prohibiting DHS from implementing the terms of the waiver agreement prior to July 1, 2017 or the effective date of the waiver agreement, whichever is later, such that the issue of funding for testing and services could be addressed as part of the 2017-19 biennial budget (Alternative 2c).

20. Finally, the Committee could delete the provision from the bill (Alternative 3) for several reasons. First, under the current FSET program, drug tests are an allowable FSET expense if such a test is required for employment. Individuals with positive test results are referred to other agencies for appropriate drug counseling services. Accordingly, it is unclear what this policy would provide that is not already provided within the current FSET program. Some may also argue that, based on the experiences of other states in implementing drug testing policies for various welfare programs, this provision may not be constitutionally permissible, nor permitted by FNS under federal SNAP regulations.

21. In addition, as there is no funding budgeted for DHS to implement drug testing or provide substance abuse services, some would argue that this provision is a policy item that should

be addressed through separate legislation, rather than as part of the state's biennial budget bill. On April 24, 2015, AB 191 was introduced that relates to drug testing and treatment for eligibility for certain work experience programs, including FSET. The provisions of AB 191 differ somewhat from the provisions included in the Governor's budget bill in several ways, including: (a) only childless adults participating in FSET would be tested; (b) an individual who tests positive would be required to participate in state-sponsored substance abuse treatment to remain eligible for FSET services; (c) while participating in treatment, an individual would be required to submit to random testing, which may result in additional treatment; and (d) DHS would submit a plan, consistent with the approved waiver, that provides a cost estimate for providing state-sponsored substance abuse treatment to the Committee for approval. Some may argue that this legislation may be a more appropriate format under which to consider such a proposal.

22. Moreover, the Committee may not wish to approve screening, testing, and possibly providing treatment services for a population that may not be more likely to have substance abuse problems than the state's general population, particularly when the costs of this policy are unknown.

23. Finally, a drug testing policy may deter individuals from participating in the FSET program, decreasing access to employment and training services that could potentially assist individuals in obtaining and sustaining employment.

ALTERNATIVES

1. Approve the Governor's recommendations.
2. Modify the Governor's provision by adopting one or more of the following options:
 - a. Limit the applicability to FSET participants who are subject to work requirements.
 - b. Specify that an individual's refusal to submit to a drug screen or test would not affect the individual's eligibility for FoodShare benefits or FSET services.
 - c. Prohibit DHS from implementing the terms of the waiver agreement prior to July 1, 2017, or the effective date of the waiver agreement, whichever is later, so that the issue of funding for testing and services could be addressed as part of the 2017-19 biennial budget.
3. Delete provision.

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