



Legislative Fiscal Bureau

One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873
Email: fiscal.bureau@legis.wisconsin.gov • Website: <http://legis.wisconsin.gov/lfb>

May, 2019

Joint Committee on Finance

Paper #416

FSET -- Drug Screening, Testing, and Treatment (Health Services -- FoodShare)

[LFB 2019-21 Budget Summary: Page 219, #2]

CURRENT LAW

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. Receipt of FoodShare benefits is contingent upon a number of financial and non-financial eligibility criteria. One such eligibility provision is the requirement that certain able-bodied adults without dependents (ABAWDs) work or participate in an approved work program for at least 80 hours per month.

FoodShare recipients participate in the FoodShare employment and training (FSET) program for a variety of reasons, including ABAWDs, who can participate in FSET to fulfill the ABAWD work requirements and maintain eligibility for FoodShare benefits.

At the time of application and at annual redetermination for eligibility for FoodShare, the income maintenance (IM) agency must administer to any ABAWD, who intends on meeting the work requirement through participation in FSET, a controlled substance abuse screening questionnaire, which may include questions related to controlled substance abuse-related criminal background and controlled substance abuse. Subsequently, the IM agency must determine whether answers to the controlled substance abuse screening questionnaire indicate possible use of a controlled substance without a valid prescription by the ABAWD. If drug use is not indicated on the questionnaire the ABAWD may proceed to participate in FSET.

In cases where the IM agency determines that the questionnaire indicates the use of a controlled substance without a valid prescription, the IM agency must refer the individual to drug testing. If the drug test is negative for use of a controlled substance, the ABAWD may proceed to

participate in FSET.

In cases where a drug test is positive for the use of a controlled substance, the individual must present a valid prescription for each positive drug to proceed to participate in FSET. If the ABAWD does not have a valid prescription, the individual will be referred to drug treatment.

As part of the referral to drug treatment ABAWDs must receive information about treatment programs and county-specific assessment and enrollment activities required for entry into treatment. Subsequently, the treatment provider must evaluate and assess the ABAWD's need for treatment. If the treatment provider determines that the ABAWD does not need treatment, the requirement is considered met and the ABAWD may proceed to participate in FSET.

If the treatment provider determines that the ABAWD needs treatment, the provider must refer the ABAWD to an appropriate treatment program and: (a) notify the IM agency of the referral and the expected start date and duration of treatment; or (b) enter the ABAWD on the waiting list for treatment and notify the IM agency of the date the individual is expected to be enrolled. The ABAWD is eligible to participate in FSET while on the waiting list if the individual is not eligible for immediate enrollment in another appropriate treatment program. As required under federal law, an individual is not considered to be an ABAWD, and therefore not required to meet the federal ABAWD work requirement, while regularly participating in an alcohol or other drug abuse treatment or rehabilitation program.

The IM agency must monitor the ABAWD's progress in entering and completing treatment and the results of random testing for the use of a controlled substance carried out during and at the conclusion of treatment.

If an ABAWD refuses to participate in the screening, testing, or treatment provisions described above, the individual will be deemed ineligible to participate in FSET and the ABAWD must subsequently meet the work requirement to retain FoodShare eligibility beyond three months of time-limited benefits in a manner other than FSET.

DHS is required to implement the screening, testing, and treatment provisions no later than October 1, 2019. To date, DHS has not implemented the requirements.

GOVERNOR

Repeal provisions that require DHS to implement a screening, testing, and treatment requirement for substance abuse, and require certain individuals to comply with these requirements, in order to participate in FSET, as described above.

DISCUSSION POINTS

1. In its 2018 State Options Report, the United States Department of Agriculture reported that as of October 1, 2017, SNAP programs in 28 states (including Wisconsin) have some eligibility restrictions on individuals convicted of a federal or state felony offense involving the possession, use,

or distribution of a controlled substance. However, no state has implemented a drug screening, testing, or treatment requirement for SNAP participants generally.

2. Federal courts have generally held that drug testing participants in public assistance programs, without reasonable suspicion is a violation of the participants' constitutional rights against unreasonable search and seizures. However, it is generally accepted that if such a program screens participants and only requires drug tests for individuals who have indicated a likelihood of substance abuse through the screen, then requiring drug tests for those individuals is not unconstitutional.

3. Historically there has been legal disagreement as to whether federal law allows for the drug testing of SNAP recipients. One side argues that states are prohibited under federal law from imposing any additional eligibility conditions, beyond those imposed by federal law, on individuals for the receipt of SNAP benefits and that drug testing would be an additional eligibility criteria. The other side argues that SNAP recipients are welfare recipients (a term not defined in federal law), and therefore fall within the state's right to test welfare recipients for use of controlled substances and sanction welfare recipients who test positive for use of controlled substances. As of yet, no court has ruled definitively on this conflict.

4. The 2015-17 biennial budget act required DHS to promulgate rules to develop and implement a drug screening, testing, and treatment program for FSET participants who are ABAWDs and choose to meet the ABAWD work requirement through FSET. In 2015, the Wisconsin Department of Justice filed a lawsuit against the federal government to verify the legality of Wisconsin's FSET drug testing requirements. The U.S. District Court for the Eastern District of Wisconsin dismissed the case, finding that the lawsuit was prematurely filed because Wisconsin had not yet implemented its program.

5. Following the dismissal by the U.S. District Court, DHS developed the administrative rules to implement these provisions. In May, 2018, DHS published rules relating to these provisions (DHS 38), which were subsequently codified in state statute, as part of 2017 Act 370, which also required implementation no later than October, 2019.

6. However, this requirement has not been implemented to date. Therefore there are no actual data on the number of people would be impacted by the provisions. However, prior to promulgating the rules, DHS completed a fiscal estimate and economic impact analysis in which the Department estimated that approximately 66,200 individuals would be screened each year, with 3% (about 2,000 individuals) requiring a drug test. Of those 2,000 individuals, DHS estimated that 11% of individuals (220 individuals) who take a drug test would test positive for controlled substances and would seek treatment.

7. In 2017-18, cumulative unduplicated ABAWD enrollment in FSET was approximately 6,000. Applying the Department's logic to the 2017-18 data would mean that approximately 6,000 individuals would be screened each year, with 3% or about 180 requiring a drug test. Of those 180 individuals, 11% (or 20 people) who take a drug test would test positive for controlled substances and would seek treatment.

8. Using data from public assistance programs administered by the Department of Children

and Families (DCF) suggests that the assumptions made by DHS regarding participation are reasonable. DCF reports that of 5,878 screened applicants between November, 2015, and March, 2019, 142 individuals were referred to testing. Of those 142 people, 14 people were referred for treatment, out of which two people refused treatment and one person completed treatment.

9. Applying the DCF rates to the 2017-18 FSET data would mean that of the approximately 6,000 individuals who would be screened each year, about 145 would be referred to drug testing. Of those 145 individuals, 14 people who take a drug test would test positive for controlled substances and be referred to treatment annually.

10. Some might argue that the drug screening, testing, and treatment requirements 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. Additionally, some might consider the cost to implement the screening, testing, and treatment requirements to be prohibitive when considering, that: (a) drug screening, testing, and treatment requirements have yielded very limited results for other state programs; and (b) drug tests are an allowable FSET expense if such a test is required for employment and individuals with positive test results can subsequently be referred to other resources for appropriate drug counseling services. For these reasons, the Committee may wish to approve the Governor's recommendation [Alternative 1].

11. On the other hand the Committee may decide to delete the provision in the Governor's budget, thereby retaining the current drug screening, testing, and treatment requirements as they pertain to ABAWDs participating in FSET. The goal of the FSET program is to prepare individuals for, and assist them in securing, suitable employment. Since some private employments are conditioned on an individual's ability to pass a drug test, some may argue that this provision is in keeping with the intent of the FSET program. Further, an argument could be made that public assistance recipients should submit to drug tests to deter those individuals from drug use, to increase employability, and to decrease dependence on public assistance benefits.

12. If the Committee decides to delete the provision, and thereby retain the drug screening, testing, and treatment requirements, funding would need to be provided for implementation. Per statute, DHS must pay for all costs related to: screening ABAWDs, including the costs of producing, administering, and reviewing screening questionnaires; testing ABAWDs including any costs related to contracting with qualified drug testing vendors; and treating ABAWDs that are not covered by the Medical Assistance program or other private insurance. Payments for treatment by DHS cannot be at rates higher than the rates paid for comparable services under the Medical Assistance program.

13. The following table shows estimates of the funding that may be necessary in each year of the biennium to retain and implement the drug screening and testing provision. The table below uses the assumptions outlined in Point 7 of this paper in determining how many people would be screened, tested, and treated for substance use disorder. Further, it adopts the Department's assumption that the average cost per initial 10-panel drug test completed by a certified drug testing vendor is \$60.73 and that treatment costs are \$3,880 per person. For purposes of this estimate, it is assumed that all individuals referred to treatment are eligible for Medical Assistance [Alternative 3].

Cost to Retain FSET Drug Screening, Testing, and Treatment Provisions

	2019-20			2020-21		
	GPR	FED	All Funds	GPR	FED	All Funds
Testing Costs	\$4,100	\$4,100	\$8,200	\$5,500	\$5,400	\$10,900
Treatment Costs (MA)	<u>23,700</u>	<u>34,500</u>	<u>58,200</u>	<u>31,400</u>	<u>46,200</u>	<u>77,600</u>
Total	\$27,800	\$38,600	\$66,400	\$36,900	\$51,600	\$88,500

14. In addition to the funding in the table above, funding would need to be provided to reimburse the IM agencies for administering the screening, as well as funding for 2.0 positions at DHS (1.0 senior research analyst and 1.0 senior training officer) to implement the FSET drug screening, testing, and treatment requirement. Funding and positions for this are addressed in LFB Paper #419.

15. Alternatively, in light of the unsettled legal disagreement, the Committee may be concerned that if it retains the mandatory FSET requirement for able-bodied adults (addressed in LFB Paper #417), DHS cannot also require drug screening, testing, and treatment without being considered to have created an additional condition of eligibility for FoodShare in violation of federal law.

16. As such, the Committee could repeal the current drug screening, testing, and treatment requirements and replace them with requirements to mirror the drug use questions on the health risk assessment for childless adults enrolled in medical assistance (MA). Under the current childless adult waiver, childless adults applying for MA are required to complete a health risk assessment, including questions on substance use, as part of their application. As they pertain to substance use, responses to questions on the health risk assessment will result in a referral for treatment, as applicable, but not impact an applicant's eligibility for MA.

17. Under this alternative, FSET vendors would be required to ask ABAWDs enrolling in FSET the same questions used on the health risk assessment for childless adults applying for MA regarding substance use. Responses to the questions would result in a referral for treatment, as applicable, but not impact the ABAWDs eligibility for participation in FSET.

18. One advantage of this alternative would be consistency with the MA program. This could help reduce confusion both for staff administering the requirements and also for the childless adults applying for MA or ABAWDs enrolling in FSET, as there is some overlap between these two populations [Alternative 2].

19. On the other hand, the Committee may be concerned that since the questions pertaining to substance use would not impact eligibility, income maintenance workers may not consistently ask the questions or follow up to ensure accurate answers, thereby limiting the referrals to treatment for people who need such services.

ALTERNATIVES

1. Approve the Governor's recommendation to repeal provisions that require DHS to implement a screening, testing, and treatment requirement for substance abuse, and require certain individuals to comply with the screening, testing, and treatment requirements for substance abuse, in order to participate in FSET.

2. Repeal the current drug screening, testing, and treatment provisions and replace them with requirements to mirror the childless adult health risk assessment questions. As they pertain to substance use, responses to questions would result in a referral for treatment, as applicable, but not affect an applicant's eligibility for enrollment in FSET.

3. Take no action and thereby retain the drug screening, testing, and treatment requirements. Provide \$66,400 (\$27,800 GPR and \$38,600 FED) in 2019-20 and \$88,500 (\$36,900 GPR and \$51,600 FED) in 2020-21.

ALT 3	Change to	
	Base	Bill
GPR	\$64,700	\$64,700
FED	<u>90,200</u>	<u>90,200</u>
Total	\$154,900	\$154,900

Prepared by: Alexandra Bentzen