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## HB 701 - Public Officers and Employees


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## PUBLIC OFFICERS AND EMPLOYEES

***Personnel Administration: Amend Article 110 of Chapter 20 of Title 45, Relating to Definitions for Drug Testing for State Employment, so as to Allow for Testing for all Forms of Opioids; To Provide for Related Matters; To Repeal Conflicting Laws; And for Other Purposes.***

CODE SECTIONS:	O.C.G.A. § 45-20-110 (amended)
BILL NUMBER:	HB 701
ACT NUMBER:	329
GEORGIA LAWS:	2018 Ga. Laws 205
SUMMARY:	The Act amends Georgia’s statute to give state employers the authority to drug test certain applicants to various public positions. The Act adds opioids, opioid analgesics, and opioid derivatives to the list of drugs for which state employers may screen.
EFFECTIVE DATE:	July 1, 2018

### *History*

“The opioid crisis is an emergency, and I’m saying officially right now, it is an emergency,”<sup>1</sup> declared President Donald Trump (R) in August 2017, a few months before he designated the opioid crisis a public health emergency.<sup>2</sup> Declaring the opioid crisis a national emergency instead of a public health emergency allows states to access special federal funds, and lets the federal government waive provisions of various federal health care laws.<sup>3</sup> The Trump

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1. Jeff Overley, *Trump to Declare Opioid Crisis a National Emergency*, LAW360 (Orlando Lorenzo ed., Aug. 10, 2017, 7:53 PM), <https://www.law360.com/articles/953347/trump-to-declare-opioid-crisis-a-national-emergency> [<https://perma.cc/DCW5-S7Q6>].

2. *Id.*; Greg Allen & Amita Kelly, *Trump Administration Declares Opioid Crisis a Public Health Emergency*, NPR (Oct. 26, 2017, 5:02 AM), <https://www.npr.org/2017/10/26/560083795/president-trump-may-declare-opioid-epidemic-national-emergency> [<https://perma.cc/YP69-8QEP>].

3. Overley, *supra* note 1.

administration's action was just one of many steps taken nationally to combat the United States' opioid epidemic.<sup>4</sup>

Although the “War on Drugs” has been fuming for over four decades,<sup>5</sup> drug abuse and the cost of combating it continue to rise.<sup>6</sup> In recent years, opioids have taken center stage in the war on drugs, with the fallout from opioid use worsening every year.<sup>7</sup> In 2015, approximately 33,000 Americans died as a result of opioid abuse.<sup>8</sup> In March 2018, deaths due to opioids increased to 115 deaths per day, nearly 42,000 annually.<sup>9</sup> In response to this worsening epidemic, lawmakers are looking for solutions at both the national and state levels.<sup>10</sup>

### *Opioids Generally*

Before legislators can begin drafting laws, they must first understand what they are trying to legislate. The term “opioid” is an umbrella term for chemicals—both natural and synthetic—that “reduce the intensity of pain signals and feelings of pain” by “interact[ing] with opioid receptors on nerve cells in the body and brain.”<sup>11</sup> The term opioid includes both legal and illegal drugs,

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4. See, e.g., Exec. Order No. 13,784, 3 C.F.R., 2017 Comp., p. 319 (2017) (establishing commission to study the opioid crisis, analyze the efficiency of the federal government's response to it, and guide further federal efforts).

5. See *A Brief History of the Drug War*, DRUG POLICY ALL. <http://www.drugpolicy.org/issues/brief-history-drug-war> (last visited Oct. 31, 2018) [<https://perma.cc/3Z4R-FKCB>].

6. See *Economics of Drug Policy and the Drug War*, DRUG WAR FACTS <http://drugwarfacts.org/chapter/economics> (last visited Oct. 31, 2018) [<https://perma.cc/V2KL-XGWQ>]. In 2013, the federal drug control budget was \$23.8 billion. *Id.* In 2018, that number increased to \$27.57 billion. *Id.*

7. *Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/epidemic/> (last updated Aug. 30, 2017) [<https://perma.cc/U6SA-DNYY>].

8. Nat'l Inst. on Drug Abuse, *Opioid Overdose Crisis*, NAT'L INST. HEALTH, <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis#one> (last updated Mar. 2018) [<https://perma.cc/DTF2-W2YX>].

9. See *id.*

10. See Joe Reedy, *Florida Legislature Passes Bill to Combat Opioid Epidemic*, ASSOCIATED PRESS (Mar. 10, 2018, 2:08 AM), <https://www.usnews.com/news/best-states/florida/articles/2018-03-09/florida-legislature-passes-bill-to-combat-opioid-epidemic> [<https://perma.cc/Z3EL-F245>].

11. *Commonly Used Terms*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/opioids/terms.html> (last updated Aug. 28, 2017) [<https://perma.cc/8SK2-DVLK>].

ranging from Schedule I narcotics like heroin<sup>12</sup> to prescription pain medications like oxycodone and morphine.<sup>13</sup>

Although legal and relatively safe when taken as medically recommended, prescription opioids are frequently abused because dependence on them develops quickly, especially when taken for several weeks.<sup>14</sup> Athletes, for instance, are particularly at risk of abusing prescription opioids.<sup>15</sup> Doctors prescribe pain medication to athletes suffering from injuries, and then athletes develop a dependence on the drug as they injure and reinjure themselves over their career.<sup>16</sup>

Americans consume more opioids than any other country in the world with 11.5 million Americans misusing opioids in 2016.<sup>17</sup> The current opioid crisis has roots that trace back to overprescribing opioids in the 1990s.<sup>18</sup> Starting in 2010, overdose deaths from heroin began rising.<sup>19</sup> The most recent chapter in the opioid epidemic began in 2013 when synthetic opioids—illegally-produced fentanyl in particular—further increased the death toll.<sup>20</sup> As a result of these three waves, the number of deaths from opioid overdoses in 2016 was five times higher than it was in 1999, making drug overdoses the number one cause of death in the United States.<sup>21</sup>

12. 21 U.S.C.S. § 812 (LEXIS through Pub. L. No. 115-185).

13. *Commonly Used Terms*, *supra* note 11.

14. GA. DEP'T LAW, *General Information and Dangers*, DOSE OF REALITY GA., <https://doseofrealityga.org/get-the-facts/dangers/> (last visited Jul. 1, 2018) [<https://perma.cc/SP3V-4QES>].

15. Linda B. Cottler et al., *Injury, Pain, and Prescription Opioid Use Among Former National Football League (NFL) Players*, 116 *DRUG & ALCOHOL DEPENDENCE* 188, 188 (2011) (“Athletes with injury-related pain, especially National Football League (NFL) players, are at increased risk for opioid use and misuse which may result in medical, psychiatric and social problems.”). In 2010, researchers conducted a phone survey of 644 retired NFL players. *Id.* Of those contacted, 52% used opioids during their career, 71% of those who used admitted to also misusing opioids, and 15% of misusers still continue to misuse opioids. *Id.*

16. *See id.* Of the former NFL players who admitted to misusing opioids during their career, 15% still continue to misuse opioids. *Id.*

17. GA. DEP'T LAW, *supra* note 14.

18. *Understanding the Epidemic*, *supra* note 7.

19. *Id.*

20. *Id.*

21. *Id.*; GA. DEP'T LAW, *supra* note 14 (“Sustaining this death toll is the equivalent of experiencing an event like September 11, 2001 every three weeks.”). Indeed, in 2016, opioid overdose deaths surpassed deaths from gun homicides and car crashes combined. *Understanding the Epidemic*, *supra* note 7.

In addition to the impact on the population, the opioid crisis has a devastating economic impact.<sup>22</sup> The White House's Council of Economic Advisors estimated that the opioid crisis's economic cost in 2015 was \$504 billion, nearly 3% of that year's GDP.<sup>23</sup> Among the states most affected by the crisis,<sup>24</sup> opioid dependency cost Ohio upwards of \$8.8 billion in 2015, before the crisis's peak in 2016.<sup>25</sup> The opioid crisis cost West Virginia, another heavily impacted state, \$8.72 billion in 2016.<sup>26</sup> Further, the number of opioid-related deaths in West Virginia has doubled over the past decade and quadrupled over the past sixteen years.<sup>27</sup>

Part of that economic impact stems from the use of opioids and other drugs in a workplace setting, which hampers productivity and increases injuries and absenteeism.<sup>28</sup> The Department of Transportation (DOT) federally mandates drug testing regulations for all DOT agencies, including employees in the aviation, trucking, mass transit, railroad, and pipeline industries.<sup>29</sup> Alcohol and drug testing requirements apply to employees and applicants in these industries who perform (or will perform) "safety-sensitive functions"—the impairment of whom would likely pose a significant safety risk.<sup>30</sup>

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22. *The Underestimated Cost of the Opioid Crisis*, COUNCIL OF ECON. ADVISORS (Nov. 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/The%20Underestimated%20Cost%20of%20the%20Opioid%20Crisis.pdf> [https://perma.cc/89YV-3PCN].

23. *Id.* (basing a portion of these economic costs on the cost of fatalities resulting from overdoses by employing "conventional economic estimates for valuing life routinely used by U.S. Federal agencies").

24. *Drug Overdose Death Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/data/statedeaths.html> (last updated Dec. 19, 2017) [https://perma.cc/7NUB-UGCX] (last updated Dec. 19, 2017). "In 2016, the five states with the highest rates of death due to drug overdose were West Virginia (52.0 per 100,000), Ohio (39.1 per 100,000), New Hampshire (39.0 per 100,000), Pennsylvania (37.9 per 100,000) and Kentucky (33.5 per 100,000)." *Id.*

25. Amanda Garrett, *Opioid Crisis Costs Ohio Billions of Dollars; Study Aims to Help Policymakers Make Better Decisions by Evaluating Epidemic's Impact*, AKRON BEACON J., May 27, 2018, at B1. Ohio spent another \$8.2 billion on educating the public about opioids in 2015. *Id.*

26. Wendy Holdren, *Opioid Crisis has Heavy Economic Impact*, TIMES W. VIRGINIAN (May 4, 2018), [http://www.timeswv.com/news/opioid-crisis-has-heavy-economic-impact/article\\_adfee262-4f52-11e8-8365-77b6b997174a.html](http://www.timeswv.com/news/opioid-crisis-has-heavy-economic-impact/article_adfee262-4f52-11e8-8365-77b6b997174a.html) [https://perma.cc/M9KQ-3QSG].

27. *Id.*

28. *Drugs and Alcohol in the Workplace*, NAT'L COUNCIL ON ALCOHOLISM & DRUG DEPENDENCE, <https://www.ncadd.org/about-addiction/addiction-update/drugs-and-alcohol-in-the-workplace> (last modified Apr. 26, 2015, 8:10 PM) [https://perma.cc/8XZC-K43P].

29. 49 C.F.R. § 40.3 (2017).

30. *Id.*; see also 82 Fed. Reg. 217, 52230 (Nov. 13, 2017) (noting that the DOT initially based its drug testing program on the Department of Health and Human Services' Mandatory Guidelines for

Historically, the DOT tested employees for five categories of drugs: marijuana; cocaine; opiates, which are opium and codeine derivatives; amphetamines and methamphetamines; and phencyclidine, also known as PCP.<sup>31</sup> However, in 2017, the DOT issued a final rule amending its drug testing requirements as applied to DOT-regulated employers to include semi-synthetic opioids like hydrocodone, hydromorphone, oxycodone, and oxymorphone.<sup>32</sup> In addition to following the Department of Health and Human Services’s Mandatory Guidelines for Federal Workplace Drug Testing Programs (HHS Mandatory Guidelines), the DOT’s inclusion of semi-synthetic opioids “is intended to help address the nation-wide epidemic of opioid abuse.”<sup>33</sup>

Allowing the DOT to detect a wider range of illegally-used drugs will also “enhance the safety of the transportation industries and the public they serve.”<sup>34</sup> As of January 1, 2018, the DOT tests for marijuana metabolites, cocaine metabolites, amphetamines, opioids, and phencyclidine.<sup>35</sup> The DOT’s new rule also changed the term “opiates” to the broader, more inclusive term “opioids” in both the Drug Testing Panel and in the definition of “[d]rugs” to encompass the substances added to DOT drug panel and to further match the HHS Mandatory Guidelines’ language.<sup>36</sup>

Although it is not one of the states most burdened by the opioid crisis, Florida nevertheless experienced 2,798 opioid-related deaths in 2016.<sup>37</sup> In response, Florida’s legislature passed House Bill (HB) 21, which provides for prescription limits on opioids and increases

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Federal Workplace Drug Testing Programs first established due to the prevalence of cocaine and marijuana abuse in the general population at the time).

31. Fed. Motor Carrier Safety Admin., *Which Substances are Tested?*, DEP’T OF TRANSP., <https://www.fmcsa.dot.gov/regulations/drug-alcohol-testing/which-substances-are-tested> (last updated Dec. 18, 2014) [<https://perma.cc/E479-263Z>].

32. 82 Fed. Reg. 217, 52230 (Nov. 13, 2017).

33. *Id.*

34. *Id.*

35. 49 C.F.R. § 40.85(d) (2017).

36. 82 Fed. Reg. 217, 52237 (Nov. 13, 2017).

37. National Institute on Drug Abuse, *Florida Opioid Summary*, NAT’L INST. HEALTH (updated Feb. 2018), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-summaries-by-state/florida-opioid-summary> [<https://perma.cc/6FCC-PFZL>] (“In the past several years, Florida has seen a dramatic increase in the number of deaths, particularly among those related to synthetic opioids. In 2016, there were 1,566 synthetic opioid-related deaths compared to 200 in 2013.”).

funding for opioid treatment.<sup>38</sup> With some exceptions, the Florida legislature mandates a limit of three days on most initial prescriptions for Fentanyl and other Schedule II painkillers.<sup>39</sup> The bill also updates Florida's prescription database and increases state and federal funding for opioid treatment programs.<sup>40</sup>

Tennessee also recently passed a bill that, like Florida's, limits the supply and dosage of opioid prescriptions for new patients.<sup>41</sup> Tennessee's legislation also "create[s] incentives for incarcerated offenders to complete intensive substance use treatment programs."<sup>42</sup> The prescription restrictions are aimed at decreasing the number of new Tennesseans who become addicted to opioids.<sup>43</sup> Tennessee's limit on the number of days for which a doctor can prescribe opioids is more lenient than Florida's three-day limit and allows doctors to discretionarily prescribe up to a ten-day supply of opioids.<sup>44</sup>

### *Georgia's Opioid Crisis*

Georgia is no exception to the national opioid crisis. Although the total deaths due to opioid overdose in Georgia tracks slightly less than the national average, Georgia's average has doubled over the last ten years.<sup>45</sup> The National Institute on Drug Abuse's most recent statistics show that 813 Georgia residents died in 2016 from either synthetic opioid drugs or prescription opioids.<sup>46</sup> These opioid-related

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38. *Reedy, supra* note 10.

39. *Id.* ("[D]octors could prescribe up to seven days for acute pain exceptions. [The bill] does not place medication limits for trauma cases, chronic pain, cancer and terminal illnesses.").

40. *Id.*

41. Jordan Buie, *Senate Passes Gov. Bill Haslam's Two Signature Bills to Address the Opioid Epidemic*, TENNESSEAN (last updated April 18, 2018, 5:50 PM), <https://www.tennessean.com/story/news/politics/2018/04/18/senate-passes-gov-bill-haslams-two-signature-bills-address-opioid-epidemic/529491002/> [<https://perma.cc/M6RG-RU47>].

42. *Id.*

43. *Id.*

44. *Id.* This longer prescription time resulted from a compromise between doctors' and medical organizations' concerns that the bill would unduly limit physicians' discretion on patients' needs for the drugs and studies cited to by lawmakers showing that patients whose opioid prescriptions exceed five days are at a higher risk of addiction. *Id.*

45. *Georgia Opioid Summary*, NAT'L INST. ON DRUG ABUSE (revised Feb. 2018), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-summaries-by-state/georgia-opioid-summary> [<https://perma.cc/55L4-V2RL>]. In 2016, Georgia saw 8.8 deaths per 100,000 people. In 2006, that number was 3.6. *Id.*

46. *Id.*

deaths outnumber the heroin overdose deaths four times.<sup>47</sup> The Georgia Attorney General's Office has taken an active role in combatting this crisis.<sup>48</sup> Its research points to inadequate control of prescription opioids as a major factor causing opioid abuse.<sup>49</sup> For example, the Office cites overprescribing by doctors, theft and burglary from pharmacies or residences, patients doctor-shopping, and unauthorized online pharmacies as some of the major causes to the increase in opioid abuse.<sup>50</sup>

Along with the Attorney General's Office, the Georgia General Assembly has taken several steps to address the opioid issue. The Georgia Senate released a 2016 study that outlined specific problems within the opioid crisis that it wished to correct and potential legislation for solving them.<sup>51</sup> The Senate identified overdose reversal, treatment programs, prevention education, neonatal abstinence syndrome, and access to opioids as the main areas for improvement.<sup>52</sup> In 2014, the General Assembly passed HB 965, which allows medical professionals to preemptively write prescriptions for Naloxone to people who the doctors expect may have an overdose.<sup>53</sup> This law also permits lay persons to administer the drug.<sup>54</sup> Additionally, the new law gives people responding to an overdose or potential overdose protection from any criminal charges.<sup>55</sup>

In 2013, the Georgia General Assembly authorized the Prescription Drug Monitoring Program (PDMP), which tracks prescriptions of controlled substances such as opioids.<sup>56</sup> The database

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47. *Id.*

48. Electronic Mail Interview with Katie Byrd, Communications Director, The State of Georgia Office of the Attorney General (Jun. 18, 2018) (on file with Georgia State University Law Review) [hereinafter Byrd Interview].

49. *What Is Driving the Growth*, OFFICE OF ATTORNEY GEN. CHRIS CARR, <https://law.georgia.gov/2-what-driving-growth> [<https://perma.cc/T7D3-5DW4>] (last visited July 1, 2018).

50. *Id.*

51. *See generally Prescription Opioids and Heroin Epidemic in Georgia*, SUBSTANCE ABUSE RESEARCH ALL., GA. PREVENTION PROJECT (2016) <http://www.senate.ga.gov/sro/Documents/StudyCommRpts/OpioidsAppendix.pdf> [<https://perma.cc/GH72-4UQP>] [hereinafter *Substance Abuse Research All.*].

52. *Id.* at 2.

53. *Id.* at 16.

54. *Id.*

55. *Id.*

56. *Substance Abuse Research All.*, *supra* note 51, at 31–32.



requires prescribers to report certain information when dispensing drugs listed in the legislation's schedule of controlled substances.<sup>57</sup> In 2016, the General Assembly revised the PDMP with HB 900.<sup>58</sup> The bill, in part, expanded the time for which the PDMP kept the information and released some of the non-patient specific information for preventative educational purposes.<sup>59</sup>

During the 2017 legislative term, the Georgia General Assembly considered several other bills related to the opioid crisis. In April 2017, a law that banned U47700 and fentanyl—two drugs that have been linked to deadly batches of opioids—became effective.<sup>60</sup> Additionally, Governor Nathan Deal (R) vetoed a bill that would have given physician assistants the ability to independently prescribe hydrocodone.<sup>61</sup> Also, from the same legislative session, Senate Bill (SB) 88 set new standards for opioid addiction facilities.<sup>62</sup>

As part of the initiatives to combat the drug crisis in general, Georgia state government employers are authorized to drug test employees and applicants in certain situations. First, Code section 45-20-90 allows state employers to conduct regular and random drug screenings of current employees only if the positions are “high risk jobs.”<sup>63</sup> The law defines high-risk jobs as those where an error would cause significant harm to the employee, co-workers, or the general public.<sup>64</sup> Further, Code sections 45-20-110 and 45-20-111 address situations in which public employers can require a drug test in pre-employment settings.<sup>65</sup> For both current employees and applicants, the statute gives discretion to the heads of the agencies, departments, and institutions to determine when a position fits the “high risk” profile.<sup>66</sup> In the pre-employment context, employers may only require

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57. *Id.* at 32.

58. O.C.G.A. § 16-13-2 (2016).

59. *Id.*

60. *New Laws in Georgia to Combat the Opioid Crisis*, GA. DRUG DETOX (June 29, 2017, 6:30 AM), <https://georgiadrugdetox.com/news/new-laws-georgia-combat-opioid-crisis/> [<https://perma.cc/J7FS-7B48>].

61. *Id.*

62. *How is Georgia Addressing the Crisis?*, OFFICE OF ATTORNEY GEN. CHRIS CARR, <https://law.georgia.gov/7-how-georgia-addressing-crisis> [<https://perma.cc/7NHG-JNHY>] (last visited July 1, 2018).

63. O.C.G.A. § 45-20-90 (2016).

64. *Id.*

65. O.C.G.A. §§ 45-20-110–11 (2016).

66. O.C.G.A. § 45-20-111(b) (2016). (“An applicant for state employment who is offered

a drug test after the applicant receives an offer.<sup>67</sup> If the applicant refuses, however, the applicant will be disqualified for the position.<sup>68</sup> If the results of the drug test come back with a positive result, the applicant may still gain employment upon showing medical documentation of a legitimate need for the substance.<sup>69</sup>

### *Bill Tracking of HB 701*

#### *Consideration and Passage by the House*

Representatives Kevin Tanner (R-9th), Sharon Cooper (R-43rd), Bill Hitchens (R-161st), Mark Newton (R-123rd), and Alan Powell (R-32rd) sponsored HB 701 in the Georgia House of Representatives.<sup>70</sup> They first introduced the bill to the House on January 18, 2018, and read it to the floor for the first time the next day.<sup>71</sup> Speaker of the House David Ralston (R-7th) assigned it to the House Health and Human Services Committee.<sup>72</sup> The House read the bill for the second time on January 22, 2018.<sup>73</sup> The Health and Human Services Committee favorably reported the bill by Committee substitute on January 30, 2018.

The original version of HB 701 removed the word “opiates” from Code section 45-20-110 and substituted it with the term “opioids.”<sup>74</sup> The Health and Human Services Committee then amended the initial version of the bill by expanding “opioids” to include “opioids, opioid analgesics, [and] opioid derivatives.”<sup>75</sup> Representatives Cooper and Tanner also modified the bill language by changing “[t]he term

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employment in a position designated by the head of the agency, department, commission, bureau, board, college, university, institution, or authority as requiring a drug test shall, prior to commencing employment or within ten days after commencing employment, submit to an established test for illegal drugs.”).

67. *Id.*

68. *Id.*

69. *Id.*

70. Georgia General Assembly, HB 701, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/701> [<https://perma.cc/9U85-KRMD>] [hereinafter HB 701 Bill Tracking].

71. *Id.*

72. *Id.*

73. *Id.*

74. HB 701, as introduced, 2018 Ga. Gen. Assemb.

75. HB 701(HCS) 2018 Ga. Gen. Assemb.

‘illegal drug’” to “[s]uch term.”<sup>76</sup> This change reflected a need to broaden the statute’s scope of drug tests for while avoiding a catch-all term that could potentially create problems in ambiguity and breadth.<sup>77</sup> The Health and Human Services Committee read this substitution favorably to the House Floor on February 5, 2018.<sup>78</sup> On the same day, the House read this bill for the third time and then held a vote.<sup>79</sup> During the floor consideration, Representative Tanner explained that HB 701 was “necessary to get in compliance with some changes that were made by the federal government around transportation drug testing that went into effect January 1st of this year.”<sup>80</sup> He further clarified that these changes allowed Georgia “to continue to receive [its] federal highway money.”<sup>81</sup> The House passed the Committee substitute by a vote of 159 to 1.<sup>82</sup>

### *Consideration and Passage by the Senate*

Senator Ben Watson (R-1st) sponsored HB 701 in the Senate.<sup>83</sup> The Senate first read and referred the bill to the Senate Health and Human Services Committee on February 6, 2018.<sup>84</sup> This Committee made no additional changes to the bill.<sup>85</sup> The Committee Chairman, Senator Renee Unterman (R-45th) held a Committee meeting on March 14, 2018, to discuss the bill.<sup>86</sup> After discussing the need for the bill to align with federal regulations, Senator Chuck Hufstetler (R-52d) asked about the device used for a urine test under the

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76. *Id.*

77. Electronic Mail Interview with Nicolas C. Smith, Director of Policy and External Affairs, The State of Georgia Office of the Attorney General (Jun. 22, 2018 2:50 PM) (on file with Georgia State University Law Review) [hereinafter Smith Electronic Mail Interview].

78. HB 701 Bill Tracking, *supra* note 70.

79. *Id.*

80. Video Recording of House Proceedings at 1 hr., 31 min., 48 sec. (Feb. 5, 2018) (remarks by Rep. Kevin Tanner (R-9th)) <https://www.youtube.com/watch?v=LX0FF9qtdMM> [<https://perma.cc/3QT5-EK6X>] [hereinafter House Floor Vote Video].

81. *Id.*

82. HB 701 Bill Tracking, *supra* note 70.

83. *Id.*

84. *Id.*

85. *See id.*

86. *Gold Dome Report—March 14, 2018*, NELSON MULLINS RILEY & SCARBOROUGH, LLP (Mar. 14, 2008), [https://www.nelsonmullins.com/idea\\_exchange/alerts/gold\\_dome/all/gold-dome-report-march-14-2018](https://www.nelsonmullins.com/idea_exchange/alerts/gold_dome/all/gold-dome-report-march-14-2018) [<https://perma.cc/9329-H766>].

statute.<sup>87</sup> He then raised concerns about the length of time that opioids remain in the body's system.<sup>88</sup> Senator Unterman further inquired as to whether urine tests were more economical than other types of tests such as blood or saliva.<sup>89</sup> The Committee did not resolve these questions,<sup>90</sup> but the Committee recommended passage of the bill.<sup>91</sup>

The Senate read the bill for the second time on March 15, 2018, and for the third time on March 21, 2018.<sup>92</sup> Senator Watson initially explained that the bill only applied to firefighters.<sup>93</sup> This prompted a question from another senator to clarify the application of the law.<sup>94</sup> Senator Watson then clarified that “the particular designation” applies to firefighters and other “federally regulated transportation positions.”<sup>95</sup> He also explained the difference between opioids and opiates, stating that opiates are naturally-occurring substances while opioids “are the semi-synthetic medicines or pain medicines.”<sup>96</sup> That same day, the Senate passed the bill by a vote of 51 to 0.<sup>97</sup>

The House sent HB 701 to Governor Nathan Deal (R) on April 2, 2018.<sup>98</sup> Governor Deal signed the bill into law on May 3, 2018, and the bill's effective date was July 1, 2018.<sup>99</sup>

### *The Act*

The Act amends Article 6 of Chapter 20 of Title 45 of the Official Code of Georgia Annotated relating to drug testing for state employment.<sup>100</sup> The overall purposes of the Act are straightforward.

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87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. HB 701 Bill Tracking, *supra* note 70.

93. Video Recording of Senate Proceedings at 1 hr., 4 min., 3 sec. (March 21, 2018) (remarks by Sen. Ben Watson (R-1st)) [https://www.youtube.com/watch?v=c9n1Kj-tK\\_o&feature=youtu.be](https://www.youtube.com/watch?v=c9n1Kj-tK_o&feature=youtu.be) [<https://perma.cc/C5RG-6RLU>] [hereinafter Senate Floor Vote Video].

94. *Id.* at 1 hr., 5 min., 30 sec. (remarks by Sen. David Lucas (D-26th)).

95. *Id.* at 1 hr., 5 min., 34 sec. (remarks by Sen. Ben Watson (R-1st)).

96. *Id.* at 1 hr. 5 min., 1 sec. (remarks by Sen. Ben Watson (R-1st)).

97. HB 701 Bill Tracking, *supra* note 70.

98. *Id.*

99. *Id.*

100. 2018 Ga. Laws 205, § 1, at 205.

As many state officials in Georgia point out, the Act merely brings the State of Georgia in compliance with recent federal law to avoid conflict or confusion between Georgia and federal law, while also acting as an extra measure in combating the opioid epidemic.<sup>101</sup> The Act further clarifies what drugs are covered by pre-employment drug screenings for potential state employees in high-risk occupations.<sup>102</sup> Georgia law defines high-risk occupations as those “where inattention to duty or errors in judgment while on duty will have the potential for significant risk of harm to the employee, other employees, or the general public.”<sup>103</sup> These occupations include DOT employees who operate motor vehicles on public roadways or health officials who perform inspections.<sup>104</sup>

### *Section 1*

Section 1 of the Act amends subsection (3) of Code section 45-20-110 relating to the definition of “[i]llegal drug” for drug testing for state employment.<sup>105</sup> The Act adds “opioids, opioid analgesics, [and] opioid derivatives” to the list of illegal drugs.<sup>106</sup> Additionally, the Act substitutes the language “[t]he term ‘illegal drug’” with “[s]uch term” at the beginning of the second sentence of subsection (3).<sup>107</sup> Otherwise, the Act retains all of the original language in the Code section.<sup>108</sup>

These amendments were made specifically in response to the lack of Georgia regulations pertaining to the current opioid emergency.<sup>109</sup> When Code section 45-20-110 was originally enacted nearly thirty years ago, the definition of “illegal drug” in subsection (3) was

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101. House Floor Vote Video, *supra* note 80, at 1 hr., 31 min.; Interview with Nicholas C. Smith, Director of External Affairs and Public Policy, The State of Georgia Office of the Attorney General at 3 min., 39 sec. (Jun. 20, 2018) (on file with Georgia State University Law Review) [hereinafter Smith Interview]. Representative Tanner remarked during House discussions that the Act’s compliance with federal law also ensures that the State of Georgia “continue[s] to receive [its] federal highway money.” House Floor Vote Video, *supra* note 80 at 1 hr., 31 min.

102. Smith Interview, *supra* note 101, at 1 min., 42 sec.

103. O.C.G.A. § 45-20-90(3) (2016).

104. See Smith Interview, *supra* note 101, at 1 min., 58 sec.

105. 2018 Ga. Laws 205, § 1, at 205.

106. *Id.*, § 1, at 205.

107. *Id.*, § 1, at 205.

108. *Id.*, § 1, at 205.

109. Smith Interview, *supra* note 101, at 3 min., 9 sec.

broad; the only drug specifically mentioned was marijuana, which was defined by reference to another Code section.<sup>110</sup> Five years later in 1995, Code section 45-20-110(3)'s definition of "illegal drug" finally specified specific drugs, among which was "opiates."<sup>111</sup> However, opioid abuse at that time was not nearly as widespread or problematic as it is today.<sup>112</sup> So, as opioid drugs evolved and their abuse increased, a need to fill the gap left by the original statute arose.<sup>113</sup> One of the Act's purposes was to fill that gap.<sup>114</sup>

In the past, "opiate" was a general term applicable to addictive drugs with effects similar to morphine, whereas "opioid" was used in some Georgia statutes "often in reference to opioid antagonists or opioid treatment generally."<sup>115</sup> However, "opioid" has recently come into wider use with "opiate" being used as the more prevalent term in Georgia's controlled substances law.<sup>116</sup> Because of that shift, the Act, in addition to "opioid analgesics" and "opioid derivatives," adds the more general term "opioid" with the intent of it acting as a catch-all term for both synthetic and natural opioids so that substances like heroine are not inconsequently left out of pre-employment drug screening.<sup>117</sup> As the key player behind including "opioid" in the Act, the Georgia Attorney General's Office consulted with the Georgia Drugs and Narcotics Agency (GDNA) and confirmed that using a catch-all term like "opioid" would not create any ambiguity in the law.<sup>118</sup>

Though the Act passed relatively unopposed,<sup>119</sup> Representative Park Cannon (D-58th) was the only vote against the Act in the House due to concerns with its scope.<sup>120</sup> Representative Cannon's

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110. O.C.G.A. § 45-20-110 (1994). The Code section also encompasses "controlled substance[s]" and "dangerous drug[s]" but, again, they are defined by reference to another Code section. *Id.*

111. O.C.G.A. § 45-20-110 (2016)

112. *Understanding the Epidemic, supra* note 7.

113. Smith Interview, *supra* note 101, at 11 min., 25 sec.

114. *Id.*

115. Electronic Mail Interview with Nicholas C. Smith, Director of External Affairs and Public Policy, The State of Georgia Office of the Attorney General (June 22, 2018) (on file with Georgia State University Law Review) [hereinafter Smith Electronic Mail Interview].

116. *Id.*

117. *Id.*; Smith Interview, *supra* note 101, at 7 min., 5 sec.

118. Smith Electronic Mail Interview, *supra* note 115.

119. *See* HB 701 Bill Tracking, *supra* note 70. The Act passed the House with only one opposing vote, and it passed the Senate with no opposing votes. *Id.*

120. Electronic Mail Interview with Rep. Park Cannon (D-58th) (July 17, 2018) (on file with Georgia

opposition stems from apparent confusion about the Act's applicability and its breadth.<sup>121</sup> During a discussion about the Act, one of its sponsors informed Representative Cannon that it "applied solely to a certain set of job duties for those who receive licenses to drive trucks for the state."<sup>122</sup> Upon further research, Representative Cannon discovered that the Act applies more generally to all high-risk state positions.<sup>123</sup>

It seems that Representative Cannon was not the only legislator who was misinformed about the Act's applicability. Just before the Senate voted on the bill, its sponsor, Senator Watson, stated that the bill applied only to firefighters.<sup>124</sup> Trying to correct himself, he later said that it only affects "transportation folks" because the new federal regulation that the bill is modeled after was promulgated by the DOT and, thus, only applies to federally-regulated transportation industries.<sup>125</sup> However, while its language is similar to that of the federal regulation, the Act's applicability is much broader because, as previously noted, it applies to applicants for Georgia state employment in high-risk occupations.<sup>126</sup>

Instead of broadly applying the bill to multiple agencies, Representative Cannon would have preferred the Act, like the federal regulation, to apply to a specific agency "that already has an issue with hiring those who are currently using opioids."<sup>127</sup> In Representative Cannon's view, the Act is not needed and is "a solution looking for a problem and is not a problem looking for a solution."<sup>128</sup> She also would have recommended a policy update within the Act so that applicants for state employment would not be tested for marijuana either.<sup>129</sup> However, it appears that

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State University Law Review) [hereinafter Cannon Interview].

121. *Id.*

122. *Id.*

123. *Id.*

124. Senate Floor Vote Video, *supra* note 93, at 1 hr., 4 mins., 3 sec. (remarks by Sen. Ben Watson (R-1st)).

125. 82 Fed. Reg. 217, 52237 (Nov. 13, 2017); Senate Floor Vote Video, *supra* note 93, at 1 hr., 5 mins., 53 sec. (remarks by Sen. Ben Watson (R-1st)).

126. Smith Interview, *supra* note 101, at 1 min., 42 sec.

127. Cannon Interview, *supra* note 120.

128. *Id.*

129. *Id.*

Representative Cannon is generally opposed to any drug screening requirements.<sup>130</sup>

### *Analysis*

#### *Comparison to the Federal Statute*

Because the opioid crisis is prevalent on both a state and federal level, both the state and federal governments have responded through new legislation. In 2017, the DOT issued a regulation changing the drugs which the Department screens for its employees.<sup>131</sup> The list now includes “opioids.”<sup>132</sup> In comparing the statutory language to the federal regulation, the Georgia law is more expansive because it also includes also opioid analgesics and opioid derivatives.<sup>133</sup> The original version of HB 701 merely changed the word “opiate” to “opioid,” which would have mirrored the federal regulation.<sup>134</sup> However, by including the other two terms, the Georgia law’s language appears more expansive.

Practically, however, both the federal and Georgia laws capture the same most-commonly-used drugs. As listed in the preamble of the DOT regulation, the change to include “opioid” specifically allows employers to test for hydrocodone, hydromorphone, oxycodone, and oxymorphone.<sup>135</sup> These are the some of the most commonly prescribed and abused semi-synthetic opioids.<sup>136</sup> Georgia laws change from opiates to the more expansive opioid, analgesics, and opioid derivatives also now captures these dangerous drugs.<sup>137</sup> Additionally, the primary motivation for changing the language in the Georgia law was to capture synthetic opium substances, which opiates does not cover.<sup>138</sup>

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130. *Id.*

131. 49 C.F.R. § 40.85 (2017).

132. 49 C.F.R. § 40.85(d) (2017).

133. *Compare* O.C.G.A. § 45-20-110(3) (Supp. 2018), *with* 49 C.F.R. § 40.85.

134. HB 701, as introduced, 2018 Ga. Gen. Assemb.

135. 82 Fed. Reg. at 52229.

136. *The Most Commonly Abused Opiates*, DRUGREHAB.ORG (May 26, 2016), <https://www.drugrehab.org/most-commonly-abused-opiates/> [<https://perma.cc/VBE4-LAC6>].

137. Smith Interview, *supra* note 101, at 1 min., 42 sec.

138. Letter from Jill A. Travis, Deputy Legislative Counsel, Legislative Services Committee to Alan Powell (July 28, 2018) (on file with Georgia State University Law Review) (Opiates are “naturally



Both federal and Georgia laws diverge more prevalently when considering to which employees the laws apply. The DOT regulation allows drug screening of all transportation employees, at any level, but it does not apply to other departments.<sup>139</sup> Code section 45-20-91 provides more expansive coverage by allowing the head of each agency to determine which positions constitute “high-risk” jobs, which are then subject to the Georgia law.<sup>140</sup> As noted above, this can include an occupation in which error would pose significant harm to other individuals.<sup>141</sup> The discretion delegated to the agencies suggests that a broader range of public employees will be subject to drug testing.

### *Constitutional Issues*

The United States Constitution provides additional protections to public, government employees, which are not provided to private sector employees. In the context of drug testing, the Fourth Amendment prohibits the unreasonable search and seizure of individuals and their effects.<sup>142</sup> However, when the federal or local government acts as an employer, rather than as a sovereign, the standards under this Fourth Amendment protection are relaxed.<sup>143</sup>

When a government employer has a sufficient and individualized suspicion about the employee’s drug use, the employer may always conduct drug screening as necessary.<sup>144</sup> When the government employer implements a general policy to conduct drug tests on all employees, however, a balancing test, which weighs the employer and employee interests, determines whether the employer may lawfully screen employees.<sup>145</sup> For jobs that involve high-risk situations or when there is a history of drug problems in the industry,

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occurring substances derived from opium, not synthetic opioids”).

139. 82 Fed. Reg. at 52229.

140. O.C.G.A. § 45-20-91(b) (2016).

141. O.C.G.A. § 45-20-91(b).

142. U.S. CONST. amend IV.

143. *Skinner v. Ry. Labor Execs’. Ass’n*, 489 U.S. 602, 620 (1989).

144. *Id.* at 624.

145. *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–66 (1989).

the employer's interest will typically outweigh the individual's right to privacy.<sup>146</sup>

HB 701 likely does not violate the Fourth Amendment. Because the pre-employment drug-screening requirement applies to all applicants in certain positions, this bill falls into the balancing test analysis rather than individualized suspicion. The bill allows employers to test only applicants to positions of "high-risk," which aligns with the limitations created by the federal courts. Additionally, the legislators of the Georgia General Assembly who sponsored the bill explained that the purpose of the bill is to cover employees like firefighters and transportation authority employees.<sup>147</sup> Although this list is likely not exhaustive, the types of employment positions mentioned by the legislators show an intent that HB 701's drug-testing requirements for opioids will only apply to positions in which the government has a strong interest in public safety.

The constitutionality of the bill on its face, however, does not ensure that every application of the statute will not violate the Fourth Amendment. HB 701 is part of a larger initiative that responds to the serious opioid crisis in Georgia. The bill also represents an expansion of the already existing pre-employment drug-screening procedures. This momentum could suggest a continued extension of drug testing to all state employees, regardless of position, and an issue could arise if this bill indicates a push to drug testing all state and local employees. Georgia Attorney General employee Nick Smith also notes the possibility of future legislation that will apply the drug-testing policies to occupations beyond those designated as high-risk.<sup>148</sup> As the bill stands currently, it does not pose any serious threats to the Fourth Amendment, but this potential expansion might.

Although not a Constitutional violation, the momentum towards eradicating drug use that this bill reflects might have the unintended consequence of simply deterring people from applying to government jobs.<sup>149</sup> With fewer candidates applying for positions, the government's ability to be more selective in its hiring process

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146. *Id.* at 685–86; *but see* *Chandler v. Miller*, 520 U.S. 305, 312, 322 (1997) (striking down a Georgia statute which required all candidates for high office to pass a drug test).

147. Senate Floor Vote Video, *supra* note 93.

148. Smith Interview, *supra* note 101, at 18 min., 45 sec.

149. Cannon Interview, *supra* note 120.

decreases. The policy that the bill represents might also deter current employees from feeling comfortable in seeking out help from their employers.<sup>150</sup>

*Michael C. Freeman, Jr. & Monica Laredo Ruiz*

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150. *Id.*