The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Flores, Chair
Senator Joyner, Vice Chair

MEETING DATE: Wednesday, March 9, 2011
TIME: 3:15 —5:15 p.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Flores, Chair; Senator Joyner, Vice Chair; Senators Bogdanoff, Braynon, Richter, Simmons, and Thrasher

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SB 410** Bennett (Similar H 7021)	Impact Fees; Reenacts a provision relating to the burden of proof required by the government in an action challenging an impact fee. Provides for retroactive operation of the act. Provides for an exception under specified circumstances. CA 02/08/2011 Favorable JU 03/09/2011 Favorable RC	Favorable Yeas 7 Nays 0
2	**SB 648** Joyner (Identical H 325)	Estates; Revises provisions relating to the intestate share of a surviving spouse. Provides a right to reform the terms of a will to correct mistakes. Provides for a court to award fees and costs in reformation and modification proceedings either against a party's share in the estate or in the form of a personal judgment against a party individually. Clarifies that a revocation of a will is subject to challenge on the grounds of fraud, duress, mistake, or undue influence, etc. JU 03/09/2011 Favorable BI RC	Favorable Yeas 7 Nays 0
3	**SB 1142** Dockery (Identical H 927, S 918)	Adverse Possession; Specifies that occupation and maintenance of property satisfies the requirements for possession for purposes of gaining title to property via adverse possession without color of title. Requires that the property appraiser add certain information related to the adverse possession claim to the parcel information on the tax roll and prescribing conditions for removal of that information. Excludes property subject to adverse possession claims without color of title from provisions authorizing the tax collector not to send a tax notice for minimum tax bills, etc. JU 03/09/2011 Favorable CA BC	Favorable Yeas 7 Nays 0

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**SM 954** Flores (Identical HM 557)	Parental Rights Amendment; Urges the Congress of the United States to propose to the states for ratification an amendment to the United States Constitution relating to parental rights. JU 03/09/2011 Not Considered CF GO	Not Considered
5	**CS/SB 728** Commerce and Tourism / Detert (Compare H 1283, CS/CS/H 7005, S 1058, S 1728)	Unemployment Compensation; Increases the number of employer payroll service providers who qualify for access to unemployment tax information by filing a memorandum of understanding. Requires that an individual claiming benefits report certain information and participate in an initial skills review. Disqualifies an individual for benefits for any week he or she is incarcerated. Requires claims to be submitted by electronic means, etc. CM 02/07/2011 Temporarily Postponed CM 02/22/2011 Fav/CS JU 03/09/2011 Fav/CS BC	Fav/CS Yeas 7 Nays 0
6	**SB 228** Siplin (Similar H 61)	Code of Student Conduct; Requires the district school board to include in the code of student conduct adopted by the board an explanation of the responsibilities of each student with regard to appropriate dress and respect for self and others and the role that appropriate dress and respect for self and others has on an orderly learning environment, etc. ED 02/21/2011 Favorable JU 03/09/2011 Favorable BC	Favorable Yeas 7 Nays 0
7	**SB 594** Hays (Similar CS/H 277)	Statutes of Limitations; Provides that actions for wrongful death against the state or one of its agencies or subdivisions must be brought within the period applicable to actions brought against other defendants. JU 03/09/2011 Fav/CS GO CA	Fav/CS Yeas 7 Nays 0

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
8	**SB 822** Bogdanoff (Compare H 391)	Expert Testimony; Provides that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion as to the facts at issue in a case under certain circumstances. Requires the courts of this state to interpret and apply the principles of expert testimony in conformity with specified United States Supreme Court decisions. JU 03/09/2011 Fav/CS BC	Fav/CS Yeas 5 Nays 2

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 410
INTRODUCER:	Senator Bennett
SUBJECT:	Impact Fees
DATE:	March 8, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	**Favorable**
2.	O'Connor	Maclure	JU	**Favorable**
3.			RC	
4.				
5.				
6.				

I. Summary:

In response to ongoing litigation,[1] this bill reenacts the section of law created by Chapter 2009-49, Laws of Florida, (HB 227 (2009 Regular Session)) that created the "preponderance of the evidence" standard of review for the government in cases challenging the imposition or amount of an impact fee.

This bill reenacts section 163.31801, Florida Statutes.

II. Present Situation:

The Florida Constitution grants local governments broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.[2] Those counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by the vote of the electors.[3] Likewise, municipalities have those governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform their functions and provide services, and exercise any power for municipal purposes, except as otherwise provided by law.[4]

[1] *Alachua County v. Cretul*, Case No. 10-CA-0478 (Fla. 2d Jud. Cir. 2010).

[2] FLA. CONST. art VIII, s. 1(f).

[3] FLA. CONST. art VIII, s. 1(g).

[4] FLA. CONST. art VIII, s. 2(b). *See also* s. 166.021(1), F.S.

The Florida Statutes enumerate the powers and duties of all county governments, unless preempted on a particular subject by general or special law.[5] Those powers include the provision of fire protection, ambulance services, parks and recreation, libraries, museums and other cultural facilities, waste and sewage collection and disposal, and water and alternative water supplies. Municipalities are afforded broad home rule powers except: annexation, merger, exercise of extraterritorial power, and subjects prohibited by the federal, state, or county constitutions or law.[6]

Given these constitutional and statutory powers, local governments may use a variety of revenue sources to fund services and improvements without express statutory authorization.[7] Special assessments, impact fees, franchise fees, and user fees or service charges are examples of these home rule revenue sources.[8]

Impact Fees

Impact fees are enacted by local home rule ordinance. These fees require total or partial payment to counties, municipalities, special districts, and school districts for the cost of additional infrastructure necessary as a result of new development. Impact fees are tailored to meet the infrastructure needs of new growth at the local level. As a result, impact fee calculations vary from jurisdiction to jurisdiction and from fee to fee. Impact fees also vary extensively depending on local costs, capacity needs, resources, and the local government's determination to charge the full cost of the fee's earmarked purposes.

Statutory Authority for Impact Fees

In 2006, the Legislature enacted s. 163.31801, F.S., to provide requirements and procedures to be followed by a county, municipality, or special district when it adopts an impact fee. By statute, an impact fee ordinance adopted by local government must, at a minimum:

- Require that the calculation of the impact fee be based on the most recent and localized data;
- Provide for accounting and reporting of impact fee collections and expenditures; if a local government imposes an impact fee to address its infrastructure needs, the entity must account for the revenues and expenditures of such impact fee in a separate accounting fund;
- Limit administrative charges for the collection of impact fees to actual costs; and
- Require that notice be provided at least 90 days before the effective date of a new or amended impact fee.[9]

[5] Section 125.01, F.S.
[6] Section 166.021, F.S.
[7] The exercise of home rule powers by local governments is constrained by whether an inconsistent provision or outright prohibition exists in the constitution, general law, or special law regarding the power at issue. Counties and municipalities cannot levy a tax without express statutory authorization because the constitution specifically prevents them from doing so. *See* FLA. CONST. art. VII, s. 1. However, local governments may levy special assessments and a variety of fees absent any general law prohibition, provided such home rule source meets the relevant legal sufficiency tests.
[8] For a catalogue of such revenue sources, see the most recent editions of the Florida Legislature's *Local Government Financial Information Handbook* and the *Florida Tax Handbook*.
[9] Section 163.31801, F.S. Other sections of law also address the ability of local governments or special districts to levy impact fees. *See* ss. 163.3202(3), 191.009(4), and 380.06, F.S.

Dual Rational Nexus Test

Impact fees have their roots in the common law. There have been a number of court decisions that address impact fee challenges.[10] For example, in *Hollywood, Inc. v. Broward County,*[11] the Fourth District Court of Appeal addressed the validity of a county ordinance that required a developer, as a condition of plat approval, to dedicate land or pay a fee for the expansion of the county level park system to accommodate the new residents of the proposed development. The court found that a reasonable dedication or impact fee requirement is permissible if (1) it offsets needs that are sufficiently attributable to the new development and (2) the fees collected are adequately earmarked for the benefit of the residents of the new development.[12] These two requirements are called the dual rational nexus test. In order to show the impact fee meets those requirements, the local government must demonstrate a rational nexus between the need for additional public facilities and the proposed development. In addition, the local government must show the funds are earmarked for the provision of public facilities to benefit the new residents.[13] Because the ordinance at issue satisfied these requirements, the court affirmed the circuit court's validation of the impact fee ordinance.[14]

The Florida Supreme Court addressed the application of impact fees for school facilities in *St. Johns County v. Northeast Florida Builders Association, Inc.*[15] The ordinance at issue conditioned the issuance of a new building permit on the payment of an impact fee. Those fees that were collected were placed in a trust fund for the school board to expend solely "to 'acquire, construct, expand and equip the educational sites and educational capital facilities necessitated by new development.'"[16] Also, the ordinance provided for a system of credits to fee-payers for land contributions or the construction of educational facilities. This ordinance required funds not expended within six years to be returned, along with interest on those funds, to the current landowner upon application.[17] The court applied the dual rational nexus test and found the county met the first prong of the test, but not the second.

The builders in *Northeast Florida Builders Association, Inc.* argued that many of the residences in the new development would have no impact on the public school system. The court found the county's determination that every 100 residential units would result in the addition of 44 students in the public school system was sufficient and, therefore, concluded the first prong of the test was satisfied. However, the court found that the ordinance did not restrict the use of the funds to sufficiently ensure that such fees would be spent to the benefit of those who paid the fees.[18]

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[10] *See, e.g., Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976); *Home Builders and Contractors' Association v. Board of County Commissioners of Palm Beach County*, 446 So. 2d 140 (Fla. 4th DCA 1983).
[11] *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th DCA 1983).
[12] *Id.* at 611.
[13] *Id.* at 611-12.
[14] *Id.* at 614.
[15] *St. Johns County v. Northeast Florida Builders Association, Inc*., 583 So. 2d 635 (Fla. 1991).
[16] *Id.* at 637 (quoting St. Johns County, Fla., Ordinance 87-60, s. 10(B) (Oct. 20, 1987)).
[17] *Id.* at 637.
[18] *Id.* at 639. Because the St. Johns County ordinance was not effective within a municipality absent an interlocal agreement between the county and municipality, there was the possibility that impact fees could be used to build a school for development within a municipality that is not subject to the impact fee.

In *Volusia County v. Aberdeen at Ormond Beach*, the Florida Supreme Court ruled that when a residential development has no potential to increase school enrollment, public school impact fees may not be imposed.[19] In *City of Zephyrhills v. Wood*, the district court upheld an impact fee on a recently purchased and renovated building, finding that structural changes had corresponding impacts on the city's water and sewer system.[20]

As developed under case law, a legally sufficient impact fee has the following characteristics:

- The fee is levied on new development, the expansion of existing development, or a change in land use that requires additional capacity for public facilities;
- The fee represents a proportional share of the cost of public facilities needed to serve new development;
- The fee is earmarked and expended for the benefit of those in the new development who have paid the fee;
- The fee is a one-time charge, although collection may be spread over a period of time;
- The fee is earmarked for capital outlay only and is not expended for operating costs; and
- The fee-payers receive credit for the contributions toward the cost of the increased capacity for public facilities.

Burden of Proof and Standard of Review

The obligation to prove a material fact in issue is known as the "burden of proof." Generally, in a legal action the burden of proof is on the party who asserts the proposition to be established, and the burden can shift between parties as the case progresses. The level or degree of proof that is required as to a particular issue is referred to as the standard of proof or "standard of review." In most civil actions, the party asserting a claim or affirmative defense must prove the claim or defense by a preponderance of the evidence.[21] The preponderance of the evidence (also known as the "greater weight of evidence") standard of proof requires that the fact finder determine whether a fact sought to be proved is more probable than not.

For impact fee cases, the dual rational nexus test states that *the government* must prove: (1) a rational nexus between the need for additional capital facilities and the growth in population generated by the development and (2) a rational nexus between the expenditures of the funds collected and the benefits accruing to the development.[22] Although the challenger has to plead its case and allege a cause of action, beyond the pleading phase the courts' language seems to place the burden of proof on the local government. Some parties have argued that prior to 2009 the standard being adopted by Florida courts was that an impact fee will be upheld if it is "fairly debatable" that the fee satisfies the dual rational nexus test.[23] In *Volusia County v. Aberdeen at Ormond Beach*, the Florida Supreme Court rephrased the standard as a "reasonableness" test.[24]

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[19] *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 134 (Fla. 2000). Volusia County had imposed a school impact fee on a mobile home park for persons age 55 and older.
[20] *City of Zephyrhills v. Wood*, 831 So. 2d 223, 225 (Fla. 2d DCA 2002).
[21] 5 Fla. Prac., Civil Practice s. 16:1 (2009 ed.).
[22] *See St. Johns County v. Northeast Florida Builders Ass'n, Inc.*, 583 So. 2d 635 (Fla. 1991).
[23] *See* FLORIDA IMPACT REVIEW TASK FORCE, February 1, 2006, Final Report & Recommendations, 15, *available at* http://www.floridalcir.gov/taskforce.cfm.
[24] *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000).

Although the standard was not clearly defined, prior to 2009 the courts generally did not require a local government to defend its impact fee by as high of a standard as preponderance of the evidence.

House Bill 227 (2009 Regular Session) amended s. 163.31801, F.S., to codify the burden of proof for impact fee ordinance challenges.[25] The bill placed the burden of proof on the government to prove by a preponderance of the evidence that the imposition or amount of the fee meets the requirements of state legal precedent or s. 163.31801, F.S. The bill also prohibited the courts from applying a deferential standard.

Litigation

A number of counties and the Florida Association of Counties sued the Florida House and Senate claiming the bill was unconstitutional.[26] The complainants are making the following arguments:

- The law violates the Separation of Powers Clause because it:
  - Changes the burden of proof,[27] and
  - Disallows a deferential standard of review.

- The law violates Section 18, Art. VII of the Florida Constitution, both:
  - Subsection (a) because the complainants argue that it requires local governments that want to levy impact fees to take action requiring the expenditure of funds because "they must assume additional burdens which would not normally exist prior to the adoption of that provision,"[28] and
  - Subsection (b) because the complainants argue that HB 227 reduced local governments' authority to raise revenues in the aggregate.

Separation of Powers

House Bill 227 is being challenged on separation of powers grounds. The complainants are alleging that Chapter 2009-49, Laws of Florida, (HB 227 (2009 Regular Session)), which directs courts not to apply a deferential standard in impact fee challenges cases, violates the separation of powers provision in Section 3, Art. II of the Florida Constitution. They argue that the deference afforded to the legislative acts of local governments by the courts is derived from the Florida Constitution and specifically the home rule authority[29] granted to counties and municipalities, and therefore, the Legislature cannot by statute direct the courts not to apply a deferential standard to the validity of impact fee ordinances since that deference is derived from the Constitution itself.[30]

[25] Chapter 2009-49, Laws of Fla.
[26] *Alachua County v. Cretul*, Case No. 10-CA-0478 (Fla. 2d Jud. Cir. 2010).
[27] In fact, HB 227 simply codified existing case law providing that the local government had the burden of proving whether an impact fee was valid. *See, e.g. Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000).
[28] *Alachua County v. Cretul*, Case No. 10-CA-0478 (Fla. 2d Jud. Cir. 2010).
[29] FLA. CONST. art VIII, s. 2.
[30] *Id.*

Section 2, Art. V of the Florida Constitution gives the Supreme Court the power to adopt rules relating to practice and procedure of the courts. The complainants in the pending lawsuit challenging House Bill 227 argue that the bill (1) changed the burden of proof and (2) changing the burden of proof violated the courts' exclusive right to adopt rules relating to practice and procedure. House Bill 227 did not change the burden of proof, just the standard of review. Moreover, it does not appear that the burden of proof and the standard of review are procedural issues falling squarely in the domain of the judiciary. Rather, the standard of review is often related to the underlying substantive issue and is often specified by statute.[31]

Section 3, Art. II of the Florida Constitution states that the "powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided [in the Florida Constitution]." However, courts have held that "if a power is not exclusive to one branch, the exercise of that non-exclusive power is not unconstitutional."[32] Complainants argue that the provision in HB 227 prohibiting the courts from applying a deferential standard of review to the validity of impact fees infringes on the power of the judiciary.

One of the primary powers of the court is to interpret the constitution.[33] In a federal or state constitutional case, standards of review and burdens of proof can become constitutional issues. An impact fee is open to being challenged on a number of state and federal constitutional grounds including: federal and state takings claims,[34] challenges that it is an improperly enacted tax,[35] and challenges that it violates the state constitutional requirement for free public schools.[36] While decreasing the standard of review might be viewed as a separation of powers problem, increasing the standard of review further protects the constitutional rights raised in these cases. Increasing constitutional protections is a function within the jurisdiction of the Legislature.

Furthermore, the Florida Supreme Court has held that a statute that attempts to control a court's judgment is valid where it merely establishes rebuttable presumptions, rather than setting forth mandatory guidelines.[37] While HB 227 does not allow a deferential standard, it still allows the court to come to its own judgment regarding the validity of the impact fee. In summary, the separation of powers challenge to the Legislature's delineation of the standard of review in

[31] *See, e.g.*, ss. 39.206, 39.407, 39.827, 57.105, 61.13001, 61.14, 68.09, 98.075, 101.048, 112.1815, 112.534, 120.56, 120.57, 163.3177, 163.31777, 163.3184, 163.3187, 163.32465, 194.301, 222.21, 287.133, 287.134, 320.6412, 322.2615, 322.2616, 322.64, 363.06, 376.305, 376.308, 379.337, 379.502, 390.01114, 400.023, 400.121, 403.121, 403.519, 403.706, 403.727, 408.08, 409.2558, 415.1045, 429.29, 440.104, 443.101, 448.110, 456.032, 552.40, 556.107, 556.116, 559.77, 560.123, 560.125, 569.23, 608.441, 627.062, 627.0628, 627.0651, 648.525, 655.50, 709.08, 732.805, 744.301, 765.109, 768.28, 768.81, and 775.082, F.S. (all applying the preponderance of evidence standard of review in different situations); s. 617.0126, F.S. (applying de no review standard to suits challenging certain action by the Department of State); and s. 120.57(1)(e), F.S. (providing a clearly erroneous standard of review related to an unadopted rule).

[32] *Simms v. Dep't of Health & Rehabilitative Servs.*, 641 So. 2d 957 (Fla. 3d DCA 1994) (citing *Dep't of Health & Rehabilitative Servs. v. Hollis*, 439 So. 2d 947, 948 (Fla. 1st DCA 1983)); *see also Florida House of Representatives v. Crist*, 999 So. 2d 601, 611 (Fla. 2008) (finding that a branch of government has the inherent right to accomplish all objects naturally within its orbit, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution).

[33] *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992).

[34] U.S. CONST. amend. V; FLA. CONST. art. I, s. 9.

[35] FLA. CONST. art. VII, s. 1.

[36] FLA. CONST. art. IX, s. 1.

[37] *Department of Agriculture and Consumer Services v. Bonanno*, 568 So. 2d 24 (Fla. 1990).

impact fee cases will ultimately turn on a court's determination of whether this delineation of the standard of review infringes upon the judiciary's authority over practice and procedure.

Mandates

House Bill 227 (2009 Regular Session) has been challenged as an unconstitutional mandate. Article VII, Section 18(a) of the Florida Constitution states that no county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds with certain exceptions and exemptions. Although the complaint argues that HB 227 violated this provision, the bill does not require any action from the local governments. The complaint does not specify what "additional burdens" it is alleging local governments are required to carry out. Therefore, it is unlikely that HB 227 violated Article VII, Section 18(a) of the Florida Constitution.

Section 18(b), Art. VII of the Florida Constitution provides that except upon approval by two-thirds of the members of each house, the Legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989. House Bill 227 did not qualify for the exemptions provided in s. 18(d), Art. VII of the Florida Constitution and did not receive a two-thirds vote in the Senate. Versions of both the Senate and House staff analyses in 2009 stated that the bill reduced local governments' authority to raise revenues.[38] However, the bill did not restrict local governments from levying impact fees nor did it change the test by which impact fees are evaluated (the dual rational nexus test). Arguably, an impact fee that is valid under case law and statutory law should be upheld both before and after HB 227 became law. The bill only should affect local governments that levy invalid impact fees, which they never had the authority to levy. To the extent that the standard of review is determined by a court to reduce the authority of the government to raise revenues in the aggregate, the bill could be deemed an unfunded mandate. Practically, the bill may lead to more impact fees being struck down as invalid. Therefore, there are logical arguments on both sides. Creating a preponderance of the evidence standard of review for impact fee challenges *may* or *may not* reduce a local government's authority to raise revenues under the Florida Constitution.[39] In order to eliminate the uncertainty regarding whether the subsection of law enacted by HB 227 was an unconstitutional mandate, SB 410 requires approval of each house of the Legislature by two-thirds of the membership.[40]

[38] House Economic Development and Community Affairs Policy Council, Staff Analysis for CS/CS/HB 227 (2009 Reg. Sess.); Senate Transportation and Economic Development Appropriations Committee, Bill Analysis for CS/SB 580 (2009 Reg. Sess.).

[39] Additionally, in 2009 the revenue estimating conference estimated that the bill would have a negative but indeterminate affect on local governments. Section 18(d), Art. VII of the Florida Constitution has an exemption for insignificant fiscal impacts. The Legislature interprets insignificant fiscal impact to mean an amount not greater than the average statewide population for the applicable fiscal year times 10 cents; the average fiscal impact, including any offsetting effects over the long term, is also considered. Therefore, if a court did find that the bill was a mandate, the impact of the bill's change in the standard of review would have to have an impact greater than $18.6 million in the applicable fiscal year to be an unconstitutional mandate.

[40] If provisions of a law were unconstitutionally enacted, the Legislature can reenact those provisions using proper constitutional methods so long as the substance of the law is constitutional. *See Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991); *see also State v. Johnson*, 616 So. 2d 1 (Fla. 1993).

III. Effect of Proposed Changes:

In response to litigation, the bill reenacts the section of the Florida Statutes that states that the government has the burden of proving by a preponderance of the evidence that an impact fee meets the standards set out in statute or in case law. The section, s. 163.31801, F.S., prohibits the courts from using a more deferential standard. To remove any doubt regarding whether this section is an unconstitutional mandate, this bill requires approval by each house of the Legislature by two-thirds of the membership.

The bill provides that it shall become effective upon becoming a law, and shall operate retroactively to June 1, 2009. If such retroactive application is held by a court of last resort to be unconstitutional, the bill states that this act should then apply prospectively from the date that the act becomes a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None. See the discussion of mandates issues in the "Present Situation" section of this bill analysis.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill specifically applies its provisions retroactively to June 1, 2009, the effective date of HB 227 (2009 Regular Session). Retroactive operation is disfavored by courts, and generally "statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction."[41] The Florida Supreme Court has articulated four issues to consider when determining whether a statute may be retroactively applied:

- Is the statute procedural or substantive?
- Was there an unambiguous legislative intent for retroactive application?
- Was a person's right vested or inchoate?
- Is the application of the statute to these facts unconstitutionally retroactive?[42]

[41] Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation*, 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).
[42] *Weingrad v. Miles*, 29 So. 3d 406, 409 (Fla. 3d DCA 2010) (internal citations omitted).

The general rule of statutory construction is that a procedural or remedial statute may operate retroactively, but that a substantive statute may not operate retroactively without clear legislative intent. Substantive laws either create or impose a new obligation or duty, or impair or destroy existing rights, and procedural laws enforce those rights or obligations.[43]

Notwithstanding a determination of whether the provisions in the bill are procedural or substantive, the bill makes it clear that it is the Legislature's intent to apply the law retroactively. "Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision retroactively."[44] A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.[45] A court would be unlikely to bar the retroactive application of this section as impairing vested rights, creating new obligations, or imposing new penalties because it reenacts current law. As an additional protection, the bill specifies that if retroactive application were held unconstitutional by a court of last resort, it would then apply prospectively.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

[43] *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).
[44] *Weingrad*, 29 So. 3d at 410.
[45] *Id.* at 411.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 648
INTRODUCER:	Senator Joyner
SUBJECT:	Estates
DATE:	March 8, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	**Pre-meeting**
2.			BI	
3.			RC	
4.				
5.				
6.				

I. Summary:

Effective October 1, 2011, the bill increases the share a decedent's surviving spouse will receive in an intestate estate to the entire intestate estate when all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse does not have any other descendants.

Effective July 1, 2011, the bill:

- Permits wills to be reformed for mistake, which would be comparable to an existing provision applicable to testamentary trusts, revocable trusts, and other trusts.
- Allows wills to be modified to achieve the testator's tax objectives where it is not contrary to the testator's probable intent.
- Authorizes a court to award taxable costs, including attorney's fees and guardian ad litem fees, in a proceeding arising to reform a will for mistake or a proceeding for modifications to achieve the testator's tax objectives.

The bill authorizes a challenge to the revocation of a will or trust on the grounds of fraud, duress, mistake, or undue influence after the death of the testator or settlor. The bill limits powers of a guardian to prosecute or defend certain proceedings, to provide that there is a rebuttable presumption that an action challenging the ward's revocation of all or part of a trust is not in the ward's best interest if the revocation relates solely to a devise. This limitation does not preclude a challenge after the ward's death.

The bill provides that Florida Rule of Civil Procedure 1.525 applies to clarify when and under what circumstances a trustee or beneficiary of a trust or attorney must file a motion for attorney's

fees and costs incurred in a judicial proceeding concerning a trust, with exceptions. Florida Rule of Civil Procedure 1.525 requires a party seeking costs or attorney's fees to serve a motion within the 30 days that follow the filing of a judgment.

Except as otherwise provided in the bill, it provides an effective date of upon becoming a law and applies to all proceedings pending before such date and all cases commenced on or after the effective date.

This bill creates sections 732.615, 732.616, and 733.1061, Florida Statutes. This bill amends sections 732.102, 732.5165, 732.518, 736.0207, 736.0406, 744.441, and 736.0201, F.S.

II. Present Situation:

Surviving Spouse's Intestate Share

In the event of intestacy, when a person dies without a will, the Florida Probate Code provides a default position which establishes a public policy. Intestate provisions are designed to distribute estates in a manner that most decedents would have wanted had they prepared their own wills.[1] If a decedent dies without any descendants, the surviving spouse gets the entire intestate estate. If a decedent dies with lineal descendants who are also descendants of the surviving spouse, the surviving spouse receives the first $60,000 of the intestate estate and one-half of the balance of the intestate estate.[2] If the decedent's descendants, one or more of whom, are not lineal descendants of the surviving spouse, the intestate estate is divided 50 percent to the surviving spouse and 50 percent to descendants.

Trusts – Reformation of Mistake

Trusts and other donative documents may be reformed due to mistake. Upon application of a settler or any interested person, the court may reform the terms of a trust, even if ambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.[3] To the contrary, the non-trust provisions of wills may not be reformed due to mistake.[4] Trusts under a will (testamentary trusts) may be reformed due to mistake, but the non-trust provisions of the same will may not be reformed for mistake.[5] Deeds of remainder interests and life insurance beneficiary designations, which are documents that have testamentary effect, may be reformed for mistake under Florida law.[6]

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[1] Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Surviving Spouse's Intestate Share (2011) (on file with the Senate Committee on Judiciary).
[2] Section 732.102, F.S.
[3] Section 736.0415, F.S.
[4] *See, e.g., In re Estate of Barker*, 448 So. 2d 28 (Fla 1st DCA 1984) (Extrinsic evidence of testator's intent regarding revocation of earlier will was not admissible and, without aid of extrinsic evidence, subsequent will was clear as to its meaning and did not preclude distribution of residuary estate to legal heirs who were specifically bequeathed only $1 each); *In re Mullin's Estate,* 128 So. 2d 617 (Fla. 2d DCA 1961) (Scrivener's mistake in drafting codicil so that residuary legatees were excluded was insufficient reason to revoke probate of an otherwise valid codicil).
[5] Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Proposed Enactment of sections 732.615, 732.616, and 733.1061, F.S. (2011) (on file with the Senate Committee on Judiciary).
[6] *Id.*

Upon application of any interested person, to achieve the settlor's tax objectives the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intent.[7] In all actions for breach of fiduciary duty or challenging the exercises of, or failure to exercise, a trustee's powers; and in proceedings under ss. 736.410-736.0417, F.S.,[8] the court shall award taxable costs as in chancery actions, including attorney fees and guardian ad litem fees.[9] When awarding the costs and fees, the court may direct payment from a party's interest or enter a judgment that may be satisfied from other property.

Wills – Post-Death Challenges to the Revocation of a Will or Codicil

A "will" is defined as an "instrument, including a codicil, executed by a person in the manner prescribed by [the Probate Code], which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will."[10] Section 732.5165, F.S., provides that a will is void if the execution is procured by fraud, duress, mistake, or undue influence. Since "will" includes an "instrument revoking a will, Florida law would appear to permit a challenge to a "written instrument" revoking a will on grounds that it was procured by fraud, duress, mistake, or undue influence. There are no reported Florida cases addressing a challenge to the revocation of a will on these grounds.[11]

Trusts – Challenge of a Revocation or Amendment of Revocable Trust

The creation of a trust may be challenged on the grounds of fraud, duress, mistake, or undue influence in post-death proceedings.[12] The law does not appear to authorize a challenge of a revocation or amendment of a revocable trust on the same grounds.[13] The Second District Court of Appeal in *Hoffman v. Kohns* allowed a challenge to a revocation of a revocable trust in post-death proceedings on the grounds that the settler had been subject to undue influence and the court set aside the revocation.[14] The *Hoffman* case was later found to be in conflict with *Genova*

[7] Section 736.0416, F.S.
[8] Proceedings under s. 736.0410, F.S., involve the modification or termination of trusts; proceedings under s. 736.04113,F.S., involve judicial modifications of an irrevocable trust when the modifications is not inconsistent with the settlor's purpose; proceedings under s. 736.04114, F.S., involve proceedings for judicial construction of an irrevocable trust with federal tax provisions; proceedings under s. 736.04115, F.S., involve judicial modification of an irrevocable trust when modification is in the best interests of beneficiaries; proceedings under s. 736.04117, F.S., involve the trustee's power to invade the principal in a trust; proceedings under s. 736.0412, F.S., involve nonjudicial modification of an irrevocable trust; proceedings under s. 736.0413, F.S., involve application of the cy pres doctrine to modify a charitable trust; proceedings under s. 736.0414, F.S., involve the modification or termination of an uneconomic trust; proceedings under s. 736.0415, F.S., involve reformation of a trust to correct mistakes; proceedings under s. 736.0416, F.S., involve modifications to achieve the settlor's tax objectives; and proceedings under s. 736.0417, F.S., involve proceedings to combine or divide trusts.
[9] Section 736.1004, F.S.
[10] Section 731.201(40), F.S.
[11] Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Revocation of a Will or Revocable Trust is Subject to Challenge (2011) (on file with the Senate Committee on Judiciary).
[12] Section 736.0406, F.S.
[13] *Hoffman v. Kohns*, 385 So. 2d 1064 (Fla. 2d DCA 1980), and *Florida National Bank of Palm Beach County v. Genova*, 460 So. 2d 895 (Fla. 1984), discussed in Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Revocation of a Will or Revocable Trust is Subject to Challenge (2011) (on file with the Senate Committee on Judiciary).
[14] *Id.*

v. Florida National Bank of Palm Beach County, where the Fourth District Court of Appeal did not allow a trustee's challenge to a settlor's attempted revocation of her revocable trust where the challenge was based on the grounds that the revocation was the product of undue influence.[15] The Fourth District reasoned that the settlor could not be deprived of her right to revoke the trust without a judicial or medical determination of the settlor's incapacity.[16] The Florida Supreme Court later disapproved *Hoffman*, when it was certified for a conflict with *Genova*.[17] The Florida Supreme Court found that undue influence cannot be asserted as a basis for preventing a competent settler from revoking a revocable trust.[18]

In a recent case, a trustee asserting that a settlor had been subject to undue influence sought to challenge a settlor's revocation of an inter vivos revocable trust after the settlor's death. Weeks prior to the settlor's death, she placed her money into a joint account with the person who allegedly asserted undue influence on the settlor.[19] The Fourth District Court of Appeal held that the settlor's revocation of a revocable trust during her lifetime was not subject to a challenge on the ground of undue influence.[20] The Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar (RPPTL) argues that once a settlor is dead, the remedies available for a post-death challenge of revocation of trust which could serve as a will substitute should be consistent with the remedies for post-death challenges to the revocation of a will or codicil.[21]

Guardianship

A guardian of the property of an incapacitated settlor may bring an action to contest the validity of all or part of a trust before the trust becomes irrevocable.[22] To prosecute or defend claims or proceedings in any jurisdictions for the protection of the estate and of the guardian in the performance of his or her duties, court approval is necessary and may only be obtained upon a finding that the action appears to be in the ward's best interests during the ward's probable lifetime.[23]

Attorney's Fees and Costs in Trust Proceedings

Uncertainty exists as to when and under what circumstances a trustee or beneficiary of a trust or attorney must file a motion for attorney's fees and costs incurred in a judicial proceeding concerning a trust.[24]

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[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *MacIntyre v. Wedell*, 12 So. 3d 273, 273 (Fla. 4th DCA 2009).
[20] *Id.*
[21] Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, *supra*, note 11.
[22] Section 736.0207, F.S.
[23] Section 744.441, F.S.
[24] The Probate & Trust Litigation Committee of the Real Property, Probate and Trust Law Section of the Florida Bar approved on September 25, 2010, to support a change in Florida law which clarifies the deadline for when and under what circumstances a trustee or beneficiary of a trust or attorney must file a motion for attorney's fees and costs incurred in a judicial proceeding concerning a trust, (2011 Legislative Position Request Form) (on file with the Senate Judiciary Committee).

III. Effect of Proposed Changes:

Surviving Spouse's Intestate Share

Effective October 1, 2011, the bill amends s. 732.102, F.S., to increase the share a decedent's surviving spouse will receive in an intestate estate to the entire intestate estate when all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse does not have any other descendants. If there are one or more surviving descendants of the decedent who are not lineal descendants of the surviving spouse, then surviving spouse gets one-half of the intestate estate. If there are one or more surviving descendants of the decedent, all of whom are also descendants of the surviving spouse, and the surviving spouse has one or more descendants who are not descendants of the decedent, the surviving spouse gets one-half of the intestate estate.

Trusts – Reformation of Mistake

Effective July 1, 2011, the bill creates s. 732.615, F.S., to permit wills to be reformed for mistake, which would be comparable to an existing provision applicable to testamentary trusts, revocable trusts, and other trusts.[25]

Effective July 1, 2011, the bill creates s. 732.616, F.S., to allow wills to be modified to achieve the testator's tax objectives where it is not contrary to the testator's probable intent, which would be comparable to existing provisions applicable to testamentary trusts, revocable trusts, and other trusts.[26]

Effective July 1, 2011, the bill creates s. 733.1061, F.S., to authorize a court to award taxable costs, including attorney's fees and guardian ad litem fees, in a proceeding arising to reform a will for mistake or a proceeding for modifications to achieve the testator's tax objectives. When awarding the costs and fees, the court may direct payment from a party's interest or enter a judgment that may be satisfied from other property.

Trusts – Challenge of a Revocation or Amendment of Revocable Trust

The bill amends s. 732.5165, F.S., to authorize a challenge to the revocation of a will on the grounds of fraud, duress, mistake, or undue influence.

The bill amends s. 732.518, F.S., to authorize a challenge to the revocation of all or part of a will.

The bill amends s. 736.0207, F.S., to authorize a challenge to the revocation of a revocable trust or part of the revocable trust on the grounds of fraud, duress, mistake, or undue influence on the death of a settlor.

The bill amends s. 736.0406, F.S., to authorize a challenge to the creation, amendment, restatement, or revocation of a trust on the grounds it was procured by fraud, duress, mistake, or undue influence.

[25] Section 736.0415, F.S.
[26] Section 736.0416, F.S.

The bill amends s. 744.441, F.S., to limit powers of a guardian to prosecute or defend certain proceedings to provide that there is a rebuttable presumption that an action challenging the ward's revocation of all or part of a trust is not in the ward's best interest if the revocation relates solely to a devise. This does not preclude a challenge after the ward's death.

Attorney's Fees and Costs in Trust Proceedings

The bill amends s. 736.0201, F.S., to clarify Florida Rule of Civil Procedure 1.525 applies to clarify when and under what circumstances a trustee or beneficiary of a trust, or attorney must file a motion for attorney's fees and costs incurred in a judicial proceeding concerning a trust. Florida Rule of Civil Procedure 1.525 requires a party seeking costs or attorney's fees to serve a motion within the 30 days that follow the filing of a judgment. The bill specifies two exceptions. It specifies that the following circumstances do not constitute taxation of costs or attorney's fees even if the payment is for services rendered or costs incurred in a judicial proceeding:

- a trustee's payment of compensation or reimbursement of costs to persons employed by the trustee from assets of the trust; or
- a determination by the court directing from what part of the trust fees or costs shall be paid, unless the determination is made in an action for a breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers.

Effective Date and Application

Except as otherwise provided in the bill, it provides an effective date of upon becoming a law and applies to all proceedings pending before such date and all cases commenced on or after the effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 1142
INTRODUCER:	Senator Dockery
SUBJECT:	Adverse Possession
DATE:	March 8, 2011
REVISED:	03/10/11

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	**Favorable**
2.			CA	
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill amends the current statutory process for gaining title to real property via an adverse possession claim without color of title. Specifically, the bill:

- Includes occupation and maintenance as one of the forms of proof of possession of property subject to an adverse possession claim;
- Requires the property appraiser to provide notice to the owner of record that an adverse possession claim was made;
- Specifies that the Department of Revenue must develop a uniform adverse possession return;
- Requires the adverse possessor to provide a "full and complete" legal description on the return;
- Requires the adverse possessor to attest to the truthfulness of the information provided in the return under penalty of perjury;
- Requires an adverse possessor to describe, on the return, how he or she is using the property subject to the adverse possession claim;
- Includes emergency rulemaking authority for the Department of Revenue related to the adverse possession return;
- Prescribes procedures governing an adverse possession claim against a portion of an identified parcel of property, or against property that does not currently have a unique parcel identification number;
- Specifies when the property appraiser may add and remove the adverse possessor to and from the parcel information on the tax roll;

- Requires property appraisers to include a notation of an adverse possession claim in any searchable property database maintained by the property appraiser;
- Provides for priority of property tax payments made by owners of record by allowing for refunds of tax payments made by adverse possessors who submit a payment prior to the owner of record; and
- Provides that tax notices must be sent to the owner of property subject to an adverse possession claim even if the county commission has authorized the tax collector to not send out tax notices for bills under a certain amount.

This bill substantially amends sections 95.18 and 197.212, Florida Statutes, and creates section 197.3335, Florida Statutes.

II. Present Situation:

Origins of Adverse Possession

The doctrine of adverse possession "dates back at least to sixteenth century England and has been an element of American law since the country's founding."[1] The first adverse possession statute appeared in the United States in North Carolina in 1715.[2]

Adverse possession is defined as "'[a] method of acquisition of title to real property by possession for a statutory period under certain conditions.'"[3] An adverse possessor must generally establish five elements in relationship to possession. The possession must be:

- Open;
- Continuous for the statutory period;
- For the entirety of the area;
- Adverse to the record owner's interests; and
- Notorious.[4]

In most jurisdictions, state statutory law prescribes the limitations period – the period in which the record owner must act to preserve his or her interests in the property – while the state's body of common law governs the nature of use and possession necessary to trigger the running of the statutory time period.[5] As legal scholars have noted, "[a]dverse possession decisions are inherently fact-specific."[6] Therefore, an adverse possessor must establish "multiple elements whose tests are elastic and provide the trier of fact with flexibility and discretion."[7]

[1] Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 286 (Spring 2006).
[2] Brian Gardiner, *Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws,* 8 IND. INT'L & COMP. L. REV. 119, 129 (1997).
[3] *Id*. at 122 (quoting BLACK'S LAW DICTIONARY 53 (6th ed. 1990)).
[4] *Id.*
[5] Klass, *supra* note 1, at 287.
[6] Geoffrey P. Anderson and David M. Pittinos, *Adverse Possession After House Bill 1148*, 37 COLO. LAW 73, 74 (Nov. 2008).
[7] *Id.*

Adverse Possession in Florida

In Florida, there are two ways to acquire land by adverse possession, which are prescribed by statute.[8] First, an individual adversely occupying property may claim property under color of title if he or she can demonstrate that the claim to title is the derivative of a recorded written document and that he or she has been in possession of the property for at least seven years.[9] It is irrelevant whether the recorded document is legally valid or is fraudulent or faulty. To demonstrate possession, the adverse possessor must prove that he or she cultivated or improved the land, or protected the land by a substantial enclosure.[10] Alternatively, in the event a person occupies land continuously without color of title – i.e., without any legal document to support a claim for title – the person may seek title to the property by filing a return with the county property appraiser's office within one year of entry onto the property, and paying all property taxes and any assessed liens during the possession of the property for seven consecutive years.[11] Similar to claims made with color of title, the adverse possessor may demonstrate possession of the property by showing that he or she:

- Protected the property by a substantial enclosure (typically a fence); or
- Cultivated or improved the property.[12]

Florida courts have noted that "[p]ublic policy and stability of our society . . . requires strict compliance with the appropriate statutes by those seeking ownership through adverse possession."[13] Adverse possession is not favored, and all doubts relating to the adverse possession claim must be resolved in favor of the property owner of record.[14] The adverse possessor must prove each essential element of an adverse possession claim by clear and convincing evidence.[15] Therefore, the adverse possession claim cannot be "'established by loose, uncertain testimony which necessitates resort to mere conjecture.'"[16]

[8] *Candler Holdings Ltd. I v. Watch Omega Holdings, L.P.*, 947 So. 2d 1231, 1234 (Fla. 1st DCA 2007). In addition to adverse possession, a party may gain use of adversely possessed property by acquiring a prescriptive easement upon a showing of 20 years of adverse use.

[9] Section 95.16, F.S. *See also Bonifay v. Dickson*, 459 So. 2d 1089 (Fla. 1st DCA 1984). The Florida Legislature, by acts now embodied in statute, reduced the period of limitations as to adverse possession to seven years but left at 20 years the period for acquisition of easements by prescription. *Crigger v. Florida Power Corp*., 436 So. 2d 937, 945 (Fla. 5th DCA 1983).

[10] Section 95.16, F.S.

[11] Section 95.18(1), F.S. The 1939 Legislature added to what is now s. 95.18(1), F.S., a provision which required that an adverse possessor without color of title must file a tax return and pay the annual taxes on the property during the term of possession. Chapter 19254, s. 1, Laws of Fla. (1939). A 1974 amendment to the statute eliminated the requirement that taxes be paid annually. Chapter 74-382, s. 1, Laws of Fla.

[12] Section 95.18(2), F.S.

[13] *Candler Holdings Ltd. I*, 947 So. 2d at 1234.

[14] *Id.*

[15] *Id.* (citing *Bailey v. Hagler*, 575 So. 2d 679, 681 (Fla. 1st DCA 1991)).

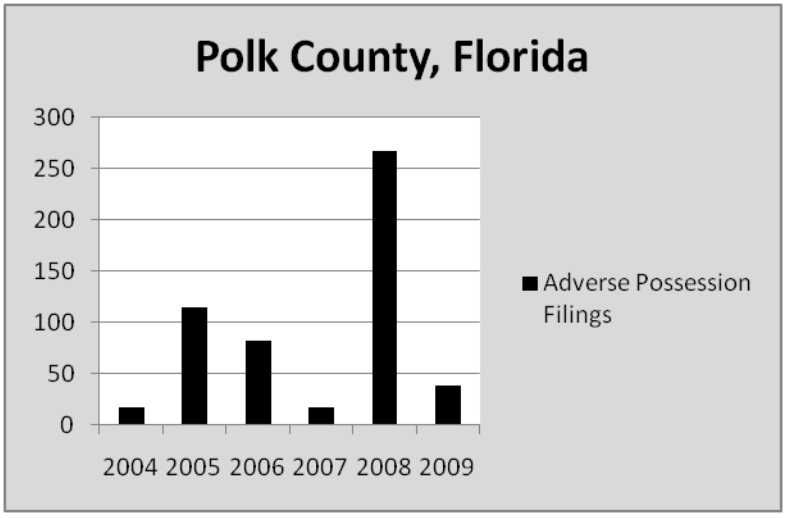
[16] *Id.* (quoting *Grant v. Strickland*, 385 So. 2d 1123, 1125 (Fla. 1st DCA 1980)).

Abuse of the Adverse Possession Process

Despite certain policy considerations supporting the application of adverse possession in Florida,[17] abuse of the statute may be occurring in certain contexts because the adverse possessor may acquire title to property in instances where the record owner attempts to pay taxes and monitors the property. Some landowners in Florida[18] have expressed concern that individuals are capitalizing on the current adverse possession laws to gain title to adjoining properties, and that the burden to overcome these claims unfairly rests with the property owner of record. For example, in some counties, adjoining landowners have filed numerous adverse possession returns on several properties and have paid property taxes on those parcels in an attempt to claim title to the property by adverse possession despite any good faith claim to title. There is no boundary line dispute or other good faith belief that the title to the property lawfully belongs to the adverse possessor. In order to protect the owner's property interests, he or she may be required to initiate litigation to eject the adverse possessor or to receive a judgment declaring his or her rights to the property. Significant legal fees and other costs may be associated with countering adverse possession claims.

Adverse Possession Trends in Florida

Some counties in Florida have experienced an influx of adverse possession claims, while other counties have received very few filings, or none at all, in recent years. For example, the following figure illustrates the number of adverse possession returns submitted to the Polk County Property Appraiser's Office in recent years:[19]



[17] *See* Comm. on Judiciary, Fla. Senate, *Review of the Requirements for Acquiring Title to Real Property through Adverse Possession* (Interim Report 2010-123) (Oct. 2009), 2, *available at* http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-123ju.pdf.

[18] Senate professional staff interviewed landowners subject to adverse possession claims, as well as real property practitioners, to gauge their experiences with the process. In some instances the record landowner may reside in another state. This absence from Florida may further impair the landowner's ability to oppose an adverse possession claim.

[19] Data provided by the Polk County Property Appraiser's Office.

Currently, Polk County has more than 500 adverse possession returns on record. In Orange County, there are 51 adverse possession returns on record out of 434,940 total parcels. The Brevard County Property Appraiser's Office has between 100 and 150 adverse possession returns on record. Although the incidence of adverse possession claims appears to be more prevalent in rural areas in Florida, urban areas also experience adverse possession claims.

Senate Review of the Adverse Possession Framework

During the 2009-10 interim, the Florida Senate Committee on Judiciary (committee) studied the current adverse possession framework in Florida and identified potential reforms to the adverse possession process for landowners, particularly those who are subject to adverse possession claims.[20] Problems associated with the current adverse possession framework identified by the report include:

- **Notice to owners of record.** In some counties, owners of record may not receive notice that an adverse possession claim is being pursued against their property. The report recommended requiring the adverse possessor or the property appraiser to provide actual or constructive notice to the owner of record of the disputed property, if the owner can be determined, upon the submission of an adverse possession return to the property appraiser.
- **Enhancements to adverse possession return.** The adverse possession return, the first step in initiation of the adverse possession process, is not used uniformly throughout the state and does not require adverse possessors to submit significant information that protects the interests of owners of record without interfering with a person's right to pursue legitimate adverse possession claims. To address these concerns, the report recommended:
    - Adopting a uniform return for adverse possession claims to promote uniformity throughout the state;
    - Providing that the adverse possessor must give a detailed description of his or her possession and use of the disputed property on the return; and
    - Requiring adverse possessors to attest to the truthfulness of the information required in the return under penalty of perjury.
- **Adverse possession notations.** Some property appraisers do not provide a clear notation in the public property database maintained on their websites of an adverse possession claim. In these counties, a property owner cannot search the property appraiser's website to quickly discern whether an adverse possession claim has been filed against a particular parcel. The report recommended requiring property appraisers to include clear notations that adverse possession filings have been made in their public searchable property databases.
- **Administration of adverse possession claims.** Property appraisers do not currently have guidance regarding how to administer the adverse possession return once it has been submitted by the adverse possessor. The report noted that the Legislature could explore the option of prescribing the process for adding the adverse possessor to the parcel information on the tax roll, as well as when a property appraiser may remove the adverse

[20] Comm. on Judiciary, Fla. Senate, *supra* note 17.

possessor from that parcel information and remove the adverse possession return from the official records.

- **Priority of tax payments.** Under the current statutory framework, if an adverse possessor makes an annual property tax payment prior to the owner of record, the tax collector cannot accept a subsequent payment from the owner of record. The report noted that the Legislature could explore the option of establishing priority of tax payments to improve an owner of record's ability to pay taxes on his or property even if the adverse possessor makes the first tax payment.

The committee report included additional options available to the Legislature to discourage abuse of the adverse possession process and to improve the administration of these claims for the benefit of record landowners, adverse possessors, and those governmental entities that are responsible for the administration of these claims.

III. Effect of Proposed Changes:

The bill amends the current process for gaining title to real property via an adverse possession claim without color of title.

Possession of the Property

The bill makes several changes to the current language included in the adverse possession (without color of title) statute for clarity, including a change designed to account for the establishment of "possession" in urban areas, and to make clear that property will be deemed to be possessed by the adverse possessor when:

- It is protected by a substantial enclosure;
- It has been usually cultivated or improved; or
- It has been occupied and maintained.

In effect, a person claiming adverse possession may establish possession under the statute by satisfying any of these three criteria. Because properties subject to adverse possession claims in urban areas may not, in some instances, be amenable to protection by a substantial enclosure, or cultivation or improvement, the bill allows the adverse possessor to establish possession by occupying and maintaining the property.

Adverse Possession Return

The bill makes several changes to the information contained in the adverse possession return submitted by an adverse possessor to initiate the adverse possession claim. The bill requires the Department of Revenue (DOR) to develop a uniform adverse possession return to be used throughout the state. In addition to the information contained on the current form developed by DOR, the bill requires the adverse possessor to provide a "full and complete legal description of

the property" on the return.[21] The adverse possessor must also attest to the truthfulness of the information contained on the form under penalty of perjury.[22]

Finally, under the bill, the adverse possessor must provide a description of his or her use of the property in the return. For example, the adverse possessor may state in the return that he or she has fenced in the property subject to the claim, or is allowing his or her cattle to graze over the subject property.

Emergency Rulemaking Authority

The bill grants the Department of Revenue (DOR) the authority to adopt emergency rules related to the changes to the adverse possession return. More specifically, the bill provides that the executive director of the DOR is authorized to adopt emergency rules for the purpose of implementing the additions and changes to the adverse possession return form created by DOR. These emergency rules may remain in effect for six months after the rules are adopted and may be renewed during the pendency of procedures to adopt final rules addressing the adverse possession return.

Notice to Owner of Record

The bill requires the property appraiser to provide notice to the owner of record that an adverse possession return was submitted. The property appraiser must send to the owner of record a copy of the return, via regular mail. The property appraiser is also required to inform the owner of record that, under the provisions created in the bill and discussed in greater detail below, any tax payment made by the owner of record prior to April 1 following the year in which the tax is assessed will have priority over any tax payment made by the adverse possessor.

Property Appraiser's Administration of the Return

Upon submission of the return, the property appraiser must complete a receipt acknowledging submission of the return. The bill authorizes the property appraiser to refuse to accept a return if it fails to comply with the requirements prescribed in the bill. Under the bill, upon receipt of the adverse possession return, the property appraiser must add a notation at the beginning of the first line of the legal description on the tax roll that an adverse possession claim has been initiated. Until a recent bulletin by the Department of Revenue advising otherwise, some property appraisers were adding the adverse possessor as an additional "owner" on the tax roll.[23] The property appraiser is also required to maintain the adverse possession return in the property appraiser's records.

[21] The Department of Revenue created a sample form return for use by property appraisers, which included the following information: date of filing; date of entering into possession of the property; name and address of the claimant; legal description of the property; notarization clause; and receipt (to be completed by the property appraiser or a designated representative upon submission of the return). *See* Florida Dep't of Revenue, Form DR-452, *Form for Return of Real Property in Attempt to Establish Adverse Possession without Color of Title* (rev. Aug. 1993).

[22] A person who knowingly made a false declaration on the return would be guilty of the crime of perjury by false written declaration, which is a third-degree felony, punishable by imprisonment not to exceed five years and a fine not to exceed $5,000. Section 92.525(3), F.S.

[23] Florida Dep't of Revenue, *Florida Department of Revenue Property Tax Information Bulletin*: *Return of Real Property in Attempt to Establish Adverse Possession without Color of Title*, *Form DR-452* (Jan. 25, 2010).

Claim Against Portion of a Parcel or Against Property Without a Parcel Number

The bill prescribes procedures when an adverse possession claim is made against a *portion* of property with a unique parcel identification number. The person claiming adverse possession shall provide a legal description of the portion sufficient for the property appraiser to identify the portion. If property appraiser cannot identify the portion of property from the description, the person must obtain a survey of the portion of property. If the whole property already has been assigned a parcel identification number, the property appraiser may not assign a new parcel number to the portion of the property subject to the claim. The property appraiser shall assign a fair and just value to the portion of the property subject to the claim.

The bill also prescribes procedures when an adverse possession claim is made against property that does not yet have a parcel identification number. The person claiming adverse possession shall provide a legal description of the property sufficient for the property appraiser to identify it. If the property appraiser cannot identify the property from the description, the person must obtain a survey of the property. The property appraiser shall assign a parcel identification number to the property and assign a fair and just value to the property.

Removal of Notation from Parcel Information

The bill also delineates when the property appraiser may remove the adverse possessor from the parcel information contained in the tax roll. Under the bill, the property appraiser must remove the notation to the legal description on the tax roll that an adverse possession return has been submitted if:

- The adverse possessor notifies the property appraiser in writing that he or she is withdrawing the claim;
- The owner of record provides a certified copy of a court order, entered after the date of the submission of the return, establishing title in the owner of record;
- The property appraiser receives a recorded deed, filed after the date of the submission of the return, transferring title of the same property subject to the claim from the adverse possessor to the owner of record; or
- The tax collector or owner of record submits to the property appraiser a receipt demonstrating that the owner of record has made an annual tax payment for the property subject to the adverse possession claim during the period that the person is claiming adverse possession.

If any one of these events occurs, the property appraiser must also remove the adverse possession return from the property appraiser's records.

Adverse Possession Filing Notation

The bill requires every property appraiser who maintains a public searchable database to provide a clear and obvious notation in the parcel information of the database maintained by the property appraiser that an adverse possession return has been submitted for the particular parcel. Those

property appraisers who do not currently offer a searchable database to the public are not subject to this requirement, unless they offer a searchable database to the public in the future.

Tax Payments

The bill provides for priority of property tax payments made by owners of record whose property is subject to an adverse possession claim. Under current law, if an adverse possessor makes a tax payment prior to the owner of record, the tax collector is not authorized to accept a subsequent payment by the owner of record. Under the bill, if an adverse possessor makes an annual tax payment on property subject to the adverse possession claim, and the owner of record subsequently makes a tax payment prior to April 1, the tax collector is required to accept the owner of record's payment. Within 60 days, the tax collector must then refund the adverse possessor's tax payment. The bill specifies that the refund to the adverse possessor is not subject to approval from the Department of Revenue.[24]

The bill also specifies that, upon receipt of a subsequent payment for the same annual tax assessment for a particular parcel, the tax collector must determine if an adverse possession return has been submitted on the particular parcel. If a return has been submitted, the tax collector must refund the payment made by the adverse possessor and afford the owner of record priority of payment as specified in the bill.

In addition, the bill sets forth the tax-payment and refund procedures when only a portion of an identified parcel of property is subject to an adverse possession claim.

The bill excludes properties subject to adverse possession claims from the minimum tax bill provision. Therefore, tax notices must be sent to the owner of property subject to an adverse possession claim even if the county commission has authorized the tax collector to not send out tax notices for bills under a certain amount.

Effective Date

The bill has an effective date of July 1, 2011, and applies to adverse possession claims in which the return was submitted on or after this date, except for the procedural provisions governing the property appraiser's administration of the adverse possession claims included in proposed s. 95.18(4)(c) and (d) (requiring the property appraiser to add a notation of the adverse possession filing and maintain a copy of the return) and (7), F.S. (delineating when the property appraiser may remove the adverse possession notation). These provisions will apply to adverse possession claims in which the return was submitted before, on, or after July 1, 2011.

Other Potential Implications:

Establishment of priority of tax payments made by owners of record whose properties are subject to an adverse possession claim would represent a significant policy shift that could effectively preclude an adverse possessor from obtaining title to property, because the adverse possessor

[24] Currently, certain refunds of $400 or more must be approved by the Department of Revenue prior to the tax collector's remittance of the refund. *See* s. 197.182(1)(i), F.S.

may be unable to satisfy the tax-payment element of the adverse possession statute. The current statutory framework contemplates that the tax payment is a necessary step for the person claiming adverse possession to gain title to the property. Therefore, current practice by tax collectors is to accept a payment made by an adverse possessor if made prior to a payment by the owner of record.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

By requiring a property appraiser to send a notice by regular mail to the owner of record when an adverse possession return is submitted, local governments are required to take action requiring the expenditure funds. However, the measure would appear to be exempt from the State Constitution's restrictions governing local mandates because the fiscal impact appears to be insignificant due to the minimal number of adverse possession claims generally submitted in a county each year.[25]

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill specifically applies some of its procedural provisions retroactively to existing cases in which a person has submitted an adverse possession return to the property appraiser. Retroactive operation is disfavored by courts and generally "statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction."[26] The Florida Supreme Court has articulated four issues to consider when determining whether a statute may be retroactively applied:

- Is the statute procedural or substantive?
- Was there an unambiguous legislative intent for retroactive application?
- Was a person's right vested or inchoate?
- Is the application of the statute to these facts unconstitutionally retroactive?[27]

The general rule of statutory construction is that a procedural or remedial statute may operate retroactively, but that a substantive statute may not operate retroactively without clear legislative intent. Substantive laws either create or impose a new obligation or duty,

[25] FLA. CONST. art. VII, s. 18(d).
[26] Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation*, 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).
[27] *Weingrad v. Miles*, 29 So. 3d 406, 409 (Fla. 3d DCA 2010) (internal citations omitted).

or impair or destroy existing rights, and procedural laws enforce those rights or obligations.[28] The provisions that this bill applies retroactively relate to the property appraisers' administration of the return by adding or removing the return from their records. These procedural steps by the property appraiser would not appear to impair the vested rights of persons pursuing adverse possession claims.

Additionally, the bill makes it clear that it is the Legislature's intent to apply the law retroactively. "Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision retroactively."[29] A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.[30] This bill does not appear to do any of these things.

Accordingly, the retroactive application of certain procedural provisions included in the bill does not appear to raise constitutional concerns.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Some landowners whose properties are subject to adverse possession claims may be relieved from certain litigation costs associated with opposing the claim.

C. Government Sector Impact:

Those property appraisers maintaining a public database may experience a minimal fiscal impact associated with the new requirement to provide a clear-and-obvious notation in the parcel information of any public searchable property database maintained by the property appraiser that an adverse possession return has been submitted. In addition, the property appraiser may experience a minimal increase in administrative costs associated with providing notice to the owner of record that the claim has been filed, as well as determining when an adverse possessor may be removed from the parcel information on the tax roll.

Tax collectors may also experience an increase in administrative costs associated with processing payments by adverse possessors and remitting refunds to adverse possessors when duplicate tax payments are made by owners of record. Because the number of adverse possession filings in most counties is minimal, these costs are not likely to be significant.

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[28] *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).
[29] *Weingrad*, 29 So. 3d at 410.
[30] *Id.* at 411.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SM 954
INTRODUCER:	Senator Flores and others
SUBJECT:	Parental Rights Amendment
DATE:	March 8, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Boland	Maclure	JU	**Pre-meeting**
2.			CF	
3.			GO	
4.				
5.				
6.				

I. Summary:

This Senate Memorial petitions the United States Congress present to the states for ratification an amendment to the United States Constitution establishing an enumerated fundamental parental right.

Although the right of parents to direct the upbringing and education of their children has long been recognized by the United States Supreme Court, this memorial, if the amendment therein proposed were to be enacted, would solidify the fundamental parental right as a constitutionally enumerated right. By enumerating a fundamental parental right, rather than relying on doctrine of the United States Supreme Court, this amendment seeks to ensure that the fundamental parental right is preserved as it now stands and protected from future revision or interpretation due to shifting ideologies of the United States Supreme Court.

Copies of the memorial are to be provided to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, and each member of the Florida delegation to the United States Congress.

II. Present Situation:

Fundamental Rights, Penumbras, and Non-Enumerated Rights

There are certain rights that the United States Supreme Court has deemed "fundamental" to every American citizen. In the broadest view, those fundamental rights are enumerated in the Bill of Rights. However, the Court has found that fundamental rights are not limited to those specifically enumerated in the United States Constitution. There are other, non-enumerated,

fundamental rights that emanate from the "penumbras" of the enumerated rights. In *Griswold v. Connecticut*, the Court held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[1] Many long-established and highly regarded fundamental rights are founded in penumbras formed by emanations from enumerated rights, and the Court, generally, treats these like any other fundamental rights.

The association of people, the right to educate a child in a school of the parents' choice, and the right to study any subject that one chooses are all rights not mentioned in the Constitution or the Bill of Rights. However, the First Amendment has been interpreted to include those rights. Likewise, the right to educate one's child as one chooses is not specifically enumerated in the Constitution or Bill of Rights. Rather, it stems from the force of the First and Fourteenth Amendments.[2] In *Griswold*, the Court stated, "Without those peripheral rights the specific rights would be less secure."[3]

These penumbral rights are often derived from history and tradition. This derivation from history and tradition, while logical, creates a more malleable right than could be achieved by enumeration. Because of these characteristics, non-enumerated rights, by their very nature, are subject to revision based on the ebb and flow of differing American and legal ideologies.

Case Law Concerning Parental Rights

In *Wisconsin v. Yoder*, the United States Supreme Court first recognized a fundamental right to parent one's child.[4] There, the Court stated:

> this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[5]

The Court recognized the state's role as *parens patriae* ("parent of his or her country") to save children from abusive or unfit parents, but recognized that this state interest must be balanced with an understanding that, absent such abuse or danger, parents do traditionally retain certain fundamental rights to direct the upbringing of their children.[6] However, the Court's decision in *Yoder* was somewhat limited by the fact that the Court based its holding on a combination of a fundamental parental right and the right to free exercise of religion.

[1] *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).
[2] *Id*. at 482.
[3] *Id*. at 482-83.
[4] *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).
[5] *Id*.
[6] *Id*. at 230.

In *Troxel v. Granville*, the Court further defined, and definitively established, a fundamental parental right.[7] The Court stated, "The liberty interest at issue in this case-the interest of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interests recognized by this Court."[8] The Court recognized a cardinal tenant that the parents' function and freedom "include preparation for obligations the state can neither supply nor hinder."[9] In defining the extent and boundaries of the fundamental parental right, the *Troxel* Court noted that as long as a parent is fit and sufficiently cares for his or her children, the state will have no reason to inject itself into the private realm, nor shall it further question a parent's ability to make decisions in the best interest of the child.[10]

Yet, even with such seemingly established precedent, Justice Souter noted in his concurrence to the *Troxel* decision, "Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child."[11] The lack of exact boundaries pointed to by Justice Souter highlights the possibility that the fundamental parental right, as it now stands, is subject to shifting views, legal interpretations, and ideologies. Currently, there exists a fundamental parental right; however, it may be argued that the right and its exact parameters have not been solidified as firmly as they might be if the fundamental parental right were to become an enumerated right.

Methods of Proposing Amendments to the U.S. Constitution

The Constitution of the United States prescribes two methods for proposing amendments to the document. Under the first method, Congress – upon the agreement of two-thirds of both houses – may propose an amendment itself. Under the second, Congress – upon application from legislatures in two-thirds of the states – "shall call a convention for proposing Amendments."[12] Under either method, Congress is authorized to specify whether the amendment must be ratified by the legislatures of three-fourths of the states or by convention in three-fourths of the states.[13]

III. Effect of Proposed Changes:

This Senate Memorial petitions the United States Congress to propose and submit to the states for ratification an amendment to the United States Constitution enumerating a fundamental parental right. In accompanying "whereas clauses," the memorial expresses an intent to ensure that the fundamental parental right recognized in case law by the United States Supreme Court is preserved as it now stands and protected from future revision or interpretation due to shifting ideologies of the United States Supreme Court. The memorial contemplates the creation of a new article of the United States Constitution.

Section 1 of the proposed amendment states that the liberty of parents to direct the upbringing and education of their children is a fundamental right. This provision would have the effect of

[7] See *Troxel v. Granville*, 530 U.S. 57 (2000).
[8] *Id*. at 65.
[9] *Id*. at 65-66.
[10] *Id*. at 68-69.
[11] *Id*. at 78.
[12] U.S. CONST. art. V.
[13] *Id*.

making the fundamental parental right a constitutionally enumerated right. This designation would afford the right the greatest degree of protection from infringement and put the fundamental parental right on the same level with rights such as freedom of speech and the right to bear arms.

Section 2 of the proposed amendment provides that no state, nor the United States itself, may infringe on this right without a showing that such infringement is the only way of achieving a governmental interest of the highest order. This section essentially codifies the standard of strict scrutiny that courts impose when determining whether or not a law that infringes on a fundamental right is constitutional. As a matter of course, most laws or governmental actions analyzed under strict scrutiny will fail on constitutional grounds and be struck down by the courts.

Section 3 of the proposed amendment further solidifies the sanctity of the fundamental parental right. It ensures that no court can apply any international law, nor may the United States adopt any treaty, which would supersede, modify, interpret, or apply to the rights guaranteed by this article. Courts will sometimes interpret the Constitution or laws of the United States by looking to the traditions and laws of other countries as the applicable "history or tradition" on which the United States' Constitution or law is based. This final provision of the proposed amendment would ensure that the above practice is not permitted.

Copies of the memorial are to be provided to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, and each member of the Florida delegation to the United States Congress.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/SB 728
INTRODUCER:	Commerce Committee and Senator Detert
SUBJECT:	Unemployment Compensation
DATE:	March 8, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Cooper	CM	**Fav/CS**
2.	Maclure	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

Florida's unemployment rate for January 2009 was 8.7 percent, and by January 2010 it was 12 percent. The latest unemployment rate reported, for December 2010, was 12 percent, which represents 1.1 million Floridians out of work. Due to the duration of high unemployment, the Unemployment Compensation Trust Fund became insolvent in August 2009 and has continued to borrow funds from the federal government since that time.

Committee Substitute (CS) for SB 728 amends the unemployment compensation statutes to revise benefit eligibility criteria and unemployment tax provisions.

The CS changes qualifying requirements by:

- Requiring claimants to participate in an initial skills review using an online education or training program, like Florida Ready to Work, as part of reporting for benefits;
- Requiring claimants to make a systematic and sustained effort to find work, and to contact at least five prospective employers each week;
- Redefining "suitable work" to require claimants to seek a job after 19 weeks of benefits which pays the minimum wage and is at least 120 percent of their weekly benefit amount;

- Requiring claimants to file continuing claims by Internet, rather than by phone or mail.

The CS changes the criteria by which claimants are disqualified from receiving benefits by:

- Changing the standard to show misconduct from "willful" (a high standard) to "conscious" (a lower standard);
- Adding a disqualification for "gross misconduct," which is defined by specific acts by an employee;
- Adding a disqualification for any weeks in which an individual receives severance pay from an employer;
- Expanding disqualification to include being fired for *all* crimes committed in connection with work (rather than only those punishable by imprisonment) and being fired for violating a criminal law which affects an employee's ability to do his or her job; and
- Adding a specific disqualification for individuals who are incarcerated or imprisoned.

The CS codifies the executive order extending the temporary state extended benefits program and amends the program to conform to new federal law.

Related to unemployment taxes, the CS:

- Allows employers to continue to have the option to pay their taxes in installments over 2012, 2013, and 2014;
- Allows employee leasing companies to make a one-time decision to change from reporting leased employees under their company account to reporting the employees under their respective clients' accounts, an option that could result in lower taxes for those companies choosing to change; and
- Increases the number of employee leasing companies who may obtain tax information for their clients by filing a memorandum of understanding, instead of filing a power of attorney for each client, with the Department of Revenue.

The CS provides specific language to allow appeals of orders by the Unemployment Appeals Commission to be filed in district courts of appeal where the claimant resides or where the business was located. The CS also codifies certain agency rules related to the exclusion of evidence that is irrelevant or repetitious, and revises the admissibility of hearsay evidence to allow it to be used to establish a fact under certain circumstances. The CS limits the amount of overpayments that can be collected from a claimant when the Agency for Workforce Innovation does not issue a nonmonetary determination within 30 days of the filing of a new claim. The CS creates a rebuttable presumption that the date on a document mailed by AWI or DOR is the date that the document was mailed.

The U.S. Department of Labor may find various provisions of this CS to be out of conformity with federal law. If the U.S. Department of Labor made such a finding, then it could result in a withholding of all administrative funding and a significant increase in employer's UC tax rates.

This CS amends the following sections of the Florida Statutes: 213.053, 443.036, 443.091, 443.101, 443.111, 443.1115, 443.1216, 443.141, 443.151, and 443.171. This CS revives, readopts, and amends s. 443.1117, F.S.

II. Present Situation:

Unemployment Compensation Overview[1]

According to the U.S. Department of Labor (USDOL), the Federal-State Unemployment Insurance Program provides unemployment benefits to eligible workers who are unemployed through no-fault of their own (as determined under state law) and who meet the requirements of state law.[2] The program is administered as a partnership of the federal government and the states.[3] The individual states collect unemployment compensation (UC) payroll taxes on a quarterly basis, which are used to pay benefits, while the Internal Revenue Service collects an annual federal payroll tax under the Federal Unemployment Tax Act (FUTA).[4] FUTA collections go to the states for costs of administering state UC and job service programs. In addition, FUTA pays one-half of the cost of extended unemployment benefits (during periods of high unemployment) and provides for a fund from which states may borrow, if necessary, to pay benefits.[5]

States are permitted to set benefit eligibility requirements, the amount and duration of benefits and the state tax structure, as long as state law does not conflict with FUTA or Social Security Act requirements. Florida's UC program was created by the Legislature in 1937.[6] The Agency for Workforce Innovation (AWI) is the current agency responsible for administering Florida's UC laws. AWI contracts with the Florida Department of Revenue (DOR) to provide unemployment tax collections services.[7]

Statutory Construction

Generally, states construe their unemployment statutes in favor of claimants. Courts have held that the unemployment laws are remedial in nature, and thus should be liberally and broadly construed.[8] Section 443.031, F.S., specifically states that ch. 443, F.S., "shall be liberally

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[1] For a comprehensive overview of Florida's unemployment compensation system, see Emerging Issues Related to Florida's Unemployment Compensation Program, The Florida Senate Committee on Commerce, Issue Brief 2010-306 (October 2009), at http://www.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-306cm.pdf (last visited 1/31/2011).

[2] USDOL, Employment and Training Administration (ETA), State Unemployment Insurance Benefits, available at http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp (last visited 2/2/2011).

[3] There are 53 state programs, including the 50 states, Puerto Rico, the Virgin Islands, and the District of Columbia.

[4] FUTA is codified at 26 U.S.C. 3301-3311.

[5] USDOL, ETA, Unemployment Insurance Tax Topic, available at http://workforcesecurity.doleta.gov/unemploy/uitaxtopic.asp (last visited 2/2/2011).

[6] Chapter 18402, L.O.F.

[7] Section 443.1316, F.S.

[8] See J.W. Williams v. State of Florida, Department of Commerce, 260 So.2d 233 (1st DCA, 1972); and Williams v. Florida Industrial Commission, 135 So.2d 435 (3rd DCA, 1961). Other states do not specify how their statutes are to be construed; instead they rely upon the interpretation of their courts to make the determination.

construed in favor of a claimant of unemployment benefits who is unemployed through no fault of his or her own."[9]

For statutory construction purposes generally, remedial statutes are liberally construed. Remedial statutes are those that provide a remedy or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries. Florida courts have held that the unemployment statutes are "remedial, humanitarian legislation."

> "[A] statute enacted for the public benefit should be construed liberally in favor of the public even though it contains a penal provision. In this posture a reasonable construction should be applied giving full measure to every effort to effectuate the legislative intent."[10]

Unemployment benefits are available as a matter of right to unemployed workers who have demonstrated their attachment to the labor force by a specified amount of recent work and/or earnings in covered employment. The purpose of the unemployment program is to benefit those unemployed through no fault of their own.[11]

State Unemployment Compensation Benefits

A qualified claimant may receive UC benefits equal to 25 percent of wages, not to exceed $7,150 in a benefit year.[12] Benefits range from a minimum of $32 per week to a maximum weekly benefit amount of $275 for up to 26 weeks, depending on the claimant's length of prior employment and wages earned.[13]

To receive UC benefits, a claimant must meet certain monetary and non-monetary eligibility requirements. Key eligibility requirements involve a claimant's earnings during a certain period of time, the manner in which the claimant became unemployed, and the claimant's efforts to find new employment.

Determinations and Redeterminations

AWI issues determinations and redeterminations on the monetary and non-monetary eligibility requirements.[14] Determinations and redeterminations are statements by the agency regarding the application of law to an individual's eligibility for benefits or the effect of the benefits on an employer's tax account. A party who believes a determination is inaccurate may request reconsideration within 20 days from the mailing date of the determination. The agency must review the information on which the request is based and issue a redetermination.

[9] See Senate Staff Analysis and Economic Impact Statement for CS/CS/SB 1448 (2003), for a discussion of this section. Other states' laws contain a public purpose section, but this was removed from Florida Statutes in 2003, while preserving the standard for liberal construction.
[10] City of Miami Beach v. Berns, 245 So.2d 38, 40 (Fla. 1971).
[11] USDOL, ETA, State Unemployment Insurance Benefits.
[12] Section 443.111(5), F.S.
[13] Section 443.111(3), F.S. A benefit week begins on Sunday and ends on Saturday.
[14] Section 443.151(3), F.S.

If a party disagrees with either the determination or redetermination, the applicant or employer may request an administrative hearing before an appeals referee. Appeals referees in AWI's Office of Appeals hold hearings and issue decisions to resolve disputes related to eligibility for unemployment compensation and the payment and collection of unemployment compensation taxes.[15]

A decision by an appeals referee can be appealed to the Unemployment Appeals Commission. The Unemployment Appeals Commission is administratively housed in AWI, but is a quasi-judicial administrative appellate body independent of AWI.[16] The commission is 100 percent federally funded and consists of a three member panel that is appointed by the Governor. It is the highest level for administrative review of contested unemployment cases decided by the Office of Appeals referees. The Unemployment Appeals Commission can affirm, reverse, or remand the referee's decision for further proceedings. A party to the appeal who disagrees with the commission's order may seek review of the decision in the Florida district courts of appeal.[17]

Able and Available for Work

A claimant must meet certain requirements in order to be eligible for benefits for each week of unemployment. These include a finding by AWI that the individual:[18]

- Has filed a claim for benefits;
- Is registered to work and reports to the One-Stop Career Center;
- Is able to and available for work;
- Participates in reemployment services;
- Has been unemployed for a waiting period of 1 week;
- Has been paid total base period wages equal to the high quarter wages multiplied by 1.5, but at least $3,400 in the base period; and
- Has submitted a valid social security number to AWI.

Section 443.036(1) and (6), F.S., provide the meaning of the phrases "able to work" and "available for work," respectively, as:

- "Able to work" means physically and mentally capable of performing the duties of the occupation in which work is being sought.
- "Available for work" means actively seeking and being ready and willing to accept suitable employment.

Additionally, AWI has adopted criteria, as directed in the statute, to determine an individual's ability to work and availability for work.[19]

[15] Appeals are governed by s. 443.151(4), F.S., and the Administrative Procedures Act, ch. 120, F.S.
[16] Section 20.50(2)(d), F.S. "The Unemployment Appeals Commission, authorized by s. 443.012, F.S., is not subject to control, supervision, or direction by the Agency for Workforce Innovation in the performance of its powers and duties but shall receive any and all support and assistance from the agency that is required for the performance of its duties."
[17] Section 443.151(4)(c), (d), and (e), F.S.
[18] Section 443.091(1), F.S.
[19] Rule 60BB-3.021, F.A.C.

The law does not distinguish between part-time and full-time work with respect to benefits. With respect to the requirements of being able to work and available for work, Rule 60BB-3.021(2), F.A.C., provides that in order to be eligible for benefits an individual must be able to work and available for work during the major portion of the individual's customary work week. Consequently, individuals whose benefits are not based on full-time work are not required to seek or be available to accept full-time work.

Reemployment

To maintain eligibility for benefits, an individual must be ready, willing, and able to work and must be actively seeking work. An individual must make a thorough and continued effort to obtain work and take positive actions to become reemployed. To aid unemployed individuals, free reemployment services and assistance are available. AWI defines reemployment services as: job search assistance, job and vocational training referrals, employment counseling and testing, labor market information, employability skills enhancement, needs assessment, orientation, and other related services provided by One-Stop Career Centers operated by local regional workforce boards.[20]

AWI's website provides links to local, state, and national employment databases.[21] Claimants are automatically registered with their local One-Stop Career Center when their claims are filed and are required to report to the One-Stop Career Center as directed by the regional workforce board for reemployment services.[22] The One-Stops provide job search counseling and workshops, occupational and labor market information, referral to potential employers, and job training assistance. Claimants may also receive an e-mail from Employ Florida Marketplace with information about employment services or available jobs.[23] Additionally, a claimant may be selected to participate in reemployment assistance services, such as Reemployment and Eligibility Assessments (REAs).[24]

Disqualification for Unemployment Compensation

Section 443.101, F.S., specifies the circumstances under which an individual would be disqualified from receiving unemployment compensation benefits, to include:

- Voluntarily leaving work without good cause, or being discharged by his or her employing unit for misconduct connected with the work;

[20] Rule 60BB-3.011(12), F.A.C.
[21] For example, on www.fluidnow.com, where individuals can claim their weeks online.
[22] AWI's Office of Workforce Services is responsible for providing One-Stop Program Support services to the Regional Workforce Boards. See s. 443.091(1)(b), F.S.
[23] Employ Florida Marketplace is a partnership of Workforce Florida, Inc., and AWI. It provides job-matching and workforce resources. https://www.employflorida.com.
[24] REAs are in-person interviews with selected UC claimants to review the claimants' adherence to state UC eligibility criteria, determine if reemployment services are needed for the claimant to secure future employment, refer individuals to reemployment services, as appropriate, and provide labor market information which addresses the claimant's specific needs. Research has shown that interviewing claimants for the above purposes reduces UC duration and saves UC trust fund resources by helping claimants find jobs faster and eliminating payments to ineligible individuals. Florida administers the REA Initiative through local One-Stop Career Centers. Rule 60BB-3.028, F.A.C., further sets forth information on reemployment services and requirements for participation.

- Failing to apply for available suitable work when directed by AWI or the One-Stop Career Center, to accept suitable work when offered, or to return to suitable self-employment when directed to do so;
- Receiving wages in lieu of notice or compensation for temporary total disability or permanent total disability under the workers' compensation law of any state with a limited exception;
- Involvement in an active labor dispute which is responsible for the individual's unemployment;
- Receiving unemployment compensation from another state;
- Making false or fraudulent representations in filing for benefits;
- Illegal immigration status;
- Receiving benefits from a retirement, pension, or annuity program with certain exceptions;
- Termination from employment for a crime punishable by imprisonment, or any dishonest act in connection with his or her work;
- Loss of employment as a leased employee for an employee leasing company or as a temporary employee for a temporary help firm if the individual fails to contact the temporary help or employee-leasing firm for reassignment; and
- Discharge from employment due to drug use or rejection from a job offer for failing a drug test.

The statute specifies the duration of the disqualification and the requirements for requalification for an individual's next benefit claim, depending on the reason for the disqualification.

As used in s. 443.101(1), F.S., the term "good cause" includes only that cause attributable to the employer or which consists of illness or disability of the individual requiring separation from work. An individual is not disqualified for voluntarily leaving temporary work to return immediately when called back to work by his or her former permanent employer that temporarily terminated his or her work within the previous 6-calendar months or for voluntarily leaving work to relocate as a result of his or her military-connected spouse's permanent change of station orders, activation orders, or unit deployment orders. An individual who voluntarily quits work for a good *personal* cause not related to any of the conditions specified in the statute will be disqualified from receiving benefits.

In determining "suitable work," the agency is directed by statute to consider several factors, including:

- Duration of an individual's unemployment;
- Proposed wages for available work, except in the 26th week of unemployment, when suitable work is a job that pays minimum wage and is 120 percent of the individual's weekly benefit amount;
- The degree of risk involved to the individual's health, safety, and morals;
- The individual's physical fitness and prior training;
- The individual's experience and prior earnings;
- The individual's length of unemployment and prospects for securing local work in his or her customary occupation; and

- The distance of the available work from the individual's residence.[25]

Financing Unemployment Compensation

Unfortunately, due to the increasing unemployment rate in Florida, the Unemployment Compensation Trust Fund has been paying out more funds than it has been collecting. The trust fund fell into deficit in August 2009, and since that time the state has requested over $2 billion in federal advances in order to continue to fund unemployment compensation claims.[26]

The decline in the balance of the trust fund, poor economic conditions, decrease in the number of employers and employees, and increasing unemployment rates have led to large increases in employer UC tax rates. Some employers face greater increases because their experience rates have increased due to laid-off employees making UC claims credited against the employers' accounts.

State Unemployment Compensation Contributions

Florida sets its own taxable wage base and rate. The funds collected are paid into the UC Trust Fund, which is maintained at the U.S. Treasury.[27] The trust fund is primarily financed through the contributory method—by employers who pay taxes on employee wages.[28] Employers' state UC taxes are used solely to pay UC benefits to unemployed Floridians.

Currently, an employer pays taxes on the first $7,000 of an employee's wages.[29] An employer's initial state tax rate is 2.7 percent.[30] After an employer is subject to benefit charges for 8-calendar quarters, the standard tax rate is 5.4 percent, but may be adjusted down to a low of 0.1 percent.[31] The adjustment in the tax rate is determined by calculating several factors.

Employer contributions are due in the month following the end of the quarter (April 30, July 31, October 31, and January 31). Most employers will have paid the $7,000 wage base to their employees in the first or second quarter of the year, making their total UC payments due early in the year.

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[25] Section 443.101(2), F.S.
[26] As of February 17, 2011. See U.S. Department of Treasury, Bureau of Public Debt, Treasury Direct's Title XII Advance Activities Schedule at http://www.treasurydirect.gov/govt/reports/tfmp/tfmp_advactivitiessched.htm (last visited 2/21/2011).
[27] Section 443.191, F.S.
[28] Nonprofit employers may choose to finance compensation through either the contributory method or the reimbursement method. A reimbursing employer is one who must pay the Unemployment Compensation Trust Fund on a dollar-for-dollar basis for the benefits paid to its former employees. The employer is otherwise not required to make payments to the trust fund. See s. 443.1312, F.S. The state and local governments are reimbursing employers. Most employers are contributory employers; DOR advised that based on the most recent data available (from January 1, 2011) there were 453,800 contributing employers and 3,256 reimbursing employers in Florida.
[29] In 2012, the taxable wage base increases to $8,500. See s. 3, ch. 2010-1, L.O.F.
[30] Section 443.131(2)(a), F.S.
[31] Section 443.131(2)(b), F.S. Because of the definition of base period, at least 10 quarters must have elapsed before a new employer can be considered chargeable for 8 quarters of benefits. See also, s. 443.131(3)(d), F.S. An employer is only eligible for variation of the standard rate if its employment record was chargeable for benefits for 12 consecutive quarters ending on June 30 of the preceding calendar year. These employers are referred to as "rated employers."

In 2010, legislation was enacted that permitted employers to spread the payment of their quarterly state UC taxes in installments over the year.[32]

	Due April 30	Due July 31	Due October 31	Due December 31	Due January 31
1st Quarter Payment	¼	¼	¼	¼	-
2nd Quarter Payment	-	⅓	⅓	⅓	-
3rd Quarter Payment	-	-	½	½	-
4th Quarter Payment	-	-	-	-	Full

For example, the quarterly payment due for the first quarter of 2010 may be spread into four equal installments, payable in each remaining quarter in 2010 (due by April 30, July 31, October 31, and December 31). However, UC taxes due for the fourth quarters of 2010 and 2011 are due as normally incurred in order for Florida employers to retain their eligibility for the FUTA tax credit for their federal UC taxes. An employer may participate in the payment plan if the employer pays an administrative fee of up to $5 with the first installment payment. Interest and penalties do not accrue so long as the employer complies with the statutory provisions.

State Unemployment Compensation Contributions – Benefit Charges

In the unemployment tax calculation, the most significant factor in determining an employer's tax rate is the "benefit ratio."[33] This is the factor over which the employer has control. Often referred to as "experience rating," this factor takes into account an employer's experience with the UC Trust Fund by the impact of the employer's laid off workers on the trust fund. Employers who lay off the most workers are charged the highest tax rates. The purpose of experience rating under Florida's UC law is to ensure that employers with higher unemployment compensation costs pay a higher tax rate.

When an individual receives unemployment compensation based on the wages an employer paid the worker, benefit charges are assigned to that employer's account. The account of each employer who paid an individual $100 or more during the period of a claim is subject to being charged a proportionate share of the compensation paid to the individual. However, an employer can obtain relief from benefit charges by responding to notification of a claim with information concerning the reason for the individual's separation from work or refusal to work.[34] An employer will not obtain relief from the benefit charges for failure to respond to the notice of claim within 20 days.[35]

[32] Section 4, ch. 2010-1, L.O.F. Section 443.141(1)(e), F.S.
[33] Section 443.131(3)(b), F.S.
[34] Section 443.131(3)(a), F.S.
[35] Section 443.151(3)(a), F.S. AWI is required to send notice to each employer who may be liable for benefits paid to an individual. Based upon information provided with filed claims for benefits and employer responses, if provided, AWI makes an initial determination on entitlement to benefits. An employer has an incentive to respond to AWI if the employer should not be liable for benefits; an employer can earn a lower tax rate by limiting the amount of benefit charges to the employer's

State Unemployment Compensation Contribution – Socialized Costs

Compensation that cannot be charged against any employer's account is recovered through "variable adjustment factors" that socialize the cost of this compensation among all contributory employers who had benefit experience during the previous 3 years. An employer's variable adjustment factor includes a portion of the following socialized costs, based upon the employer's experience rate: the noncharge ratio (benefits not attributable to any employer over the last 3 years, also called "overpayments"),[36] the excess payments ratio (that portion of benefit charges which exceed the maximum rate of 5.4 percent),[37] and the fund size factor (requires the trust fund maintain a certain balance, discussed below as "triggers").[38]

The "final adjustment factor" is another factor in determining an employer's tax rate. It is a constant factor that applies to every employer regardless of experience rating.[39] The "final adjustment factor" takes into account-socialized costs, described above. This factor is also applied to employers who have no benefit charges in the preceding 3 years; as a result, this factor determines the minimum rate for the year.[40]

State Unemployment Compensation Contribution – Trust Fund Triggers

Florida's tax calculation method, especially due to the benefit ratio, is closer to a "pay as you go" approach, in which taxes increase rapidly after a surge in benefit costs. Economic conditions resulting in abnormally high unemployment accompanied by high benefit charges can cause a severe drain on the UC Trust Fund. The effect triggers the positive fund balance adjustment factor, which consequently increases tax rates for all employers. Conversely, when unemployment is low, the negative fund balance adjustment factor triggers, and tax rates for employers are reduced accordingly.[41]

The basis for the adjustment factors is the level of the trust fund on September 30 of each calendar year compared to the taxable payrolls for the previous year. Each adjustment factor remains in effect until the balance of the trust fund rises above or falls below the respective trigger percentage.

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account. A claimant is not required to repay any overpayments due to the employer's failure to respond, so long as there is no fraud involved.

[36] For example, these socialized costs include overpayments.

[37] Employers who have an experience rating that, if translated to a tax rate, would exceed the maximum rate get a break and any costs of unemployment benefits that exceed that 5.4 percent maximum tax rate are socialized to all other employers.

[38] Section 443.131(3)(e), F.S. See also DOR, What employers need to know about Florida Unemployment Compensation Law: How Rates are Calculated, at http://dor.myflorida.com/dor/taxes/unemploy_comp_law.html#how (last visited 2/2/2011).

[39] If the combined factors exceed the maximum rate, the employer is assigned the maximum rate of 5.4 percent.

[40] DOR, What employers need to know about Florida Unemployment Compensation Law: How Rates are Calculated.

[41] Emerging Issues Related to Florida's Unemployment Compensation Program, The Florida Senate Committee on Commerce, Issue Brief 2010-306 (October 2009). Currently, the negative adjustment factor is not available until January 1, 2015, and then not in any calendar year in which a federal advance, or loan, from the federal government is still in repayment for the principal amount of the loan.

State Unemployment Compensation Contribution – 2011 Rates and Forecasts

In 2010, the Legislature turned the trust fund triggers "off" to avoid a significant rate increase for employers.[42] However, taxes still significantly increased from 2010 to 2011. This was due to a large increase in socialized costs, mostly attributable to costs associated with employers whose tax rate does not generate enough money to pay for all the benefits charged to their accounts due to the statutory maximum rate (or "maximum cap").

The rates have been calculated for each Florida business that pays UC tax. The figures show that a business paying the minimum tax rate, which is the majority of Florida businesses (about 220,000), will see a tax rate increase from 0.36 percent to 1.03 percent. This means that a business that paid $25.20 per employee under the previous rate will pay $72.10 per employee in 2011. Those businesses at the maximum rate will still pay a per employee rate of $378 due to the maximum cap. Since most employers will have paid the $7,000 wage base to their employees in the first or second quarter of the year, these businesses will have paid their annual UC tax bill in the first or second quarter of 2011.

	2010 Taxes		**2011 Taxes**	
Minimum Rate	0.36%	$25.20	1.03%	$72.10
Maximum Rate	5.4%	$378	5.4%	$378

Further, due in part to the short term relief provided to employers by legislation passed in the 2010 Regular Session, employers will be faced with a significant jump in tax rates beginning in 2012. Other facts affecting employer taxes in 2012 include the calculation of the trust fund factor and the scheduled increase in the wage base to $8,500.[43]

	2011 Taxes ($7,000 wage base + tax trigger off)		**2012 Taxes**[44] ($8,500 wage base + tax trigger on)		**2013 Taxes** ($8,500 wage base + tax trigger on)		**2014 Taxes** ($8,500 wage base + tax trigger on)	
Minimum Rate	1.03%	$72.10	2.43%	$206.55	2.07%	175.95	1.73%	147.05
Maximum Rate	5.4%	$378	5.4%	$459	5.4%	$459	5.4%	$459

In addition to the economic conditions which attributed to the increase in the contribution rate, the number of employers and employees have significantly decreased over the past year. Because there are fewer employers paying UC taxes on fewer employees to fund the UC Trust Fund, with the positive fund balance adjustment factor triggering "on" in 2012, existing employers will have to contribute more than they otherwise would have had to contribute in good economic times in order to reduce the current trust fund debt.

[42] Section 3, ch. 2010-1, L.O.F.
[43] Chapter 2009-99, L.O.F., increased the wage based to $8,500 beginning in 2010; ch. 2010-1, L.O.F., delayed this increased until 2012.
[44] Unemployment Compensation Trust Fund Forecast dated February 2011, by the Office of Economic and Demographic Research, on file with the Senate Commerce and Tourism Committee.

Federal Unemployment Compensation Contributions

The Internal Revenue Service charges each liable employer a federal unemployment tax of 6.2 percent on employees' annual wages.[45] If, however, a state program meets the federal requirements and has no delinquent federal loans, employers are eligible for up to a 5.4 percent tax credit, making the net federal tax rate 0.8 percent. Employers file an annual return with the Internal Revenue Service each January for taxes on the first $7,000 of each employee's annual wages during the previous year.

The USDOL provides AWI with administrative resource grants from the taxes collected from employers pursuant to FUTA. These grants are used to fund the operations of the state's UC program, including the processing of claims for benefits by AWI, state unemployment tax collections performed by DOR, appeals conducted by AWI and the Unemployment Appeals Commission, and related administrative functions.

Federal Advances

States may borrow money from the federal government through the USDOL to pay benefit claims whenever the state lacks funds to pay claims due in any month. Such loans are referred to as "advances." The state's trust fund balance must be zero in order to receive an advance.

Many states have experienced chronic problems with UC trust fund insolvency, causing them to borrow from the federal government to pay benefits and resulting in increased federal taxes to repay the loans (see below *Federal Advance – FUTA Credit Loss*). In response, these states have restricted eligibility to UC benefits to reduce benefit costs, thereby reducing the number of workers who are eligible to receive benefits and, consequently, jeopardizing the value of their UC programs as economic stabilizers.[46] In the current economic climate, states are increasingly requesting federal advances. Thirty-three states, including the Virgin Islands, currently have requested federal advances.[47] Six states have paid off their federal advances, including Texas, Tennessee, and Maryland.[48]

Prior to August 2009, Florida's UC Trust Fund had never become insolvent during the history of the tax trigger. In the aftermath of the 1973-1975 recession, the state anticipated the UC Trust Fund's reserves were insufficient to pay benefits. Consequently, the state twice borrowed funds from the federal government – $10 million in 1976 and $32 million in 1977. However, Florida's trust fund remained solvent and the loans were never drawn down. With the exceptions of 1976

[45] The Federal Unemployment Tax Act (FUTA) is set to be reduced by 0.2 percent in June 2011 (considered a 0.2 percent surtax). 26 U.S.C. s. 3301 (2009). However, since the tax was increased to 6.2 percent in the mid-1980s, each year that the tax has been set to be reduced, Congress has enacted legislation that maintains the surtax.

[46] Vroman, Wayne, The Role of Unemployment Insurance as an Automatic Stabilizer During a Recession, The Urban Institute, IMPAQ International, LLC, and USDOL, ETA, July 2010, available at http://wdr.doleta.gov/research/FullText_Documents/ETAOP2010-10.pdf (last visited 2/1/2011).

[47] U.S. Department of Treasury, Bureau of Public Debt, Treasury Direct's Title XII Advance Activities Schedule at http://www.treasurydirect.gov/govt/reports/tfmp/tfmp_advactivitiessched.htm (last visited 2/1/2011).

[48] Some of these states only took out short term advances from USDOL. Other states took steps to increase their taxes to repay the federal advances. Texas issued bonds to repay their debt, and employers in that state will incur a new assessment in addition to state UC taxes to pay the debt service due on the bonds.

and 1977, Florida had never sought a federal loan, making this state one of the few to avoid serious and chronic problems with trust fund insolvency.[49]

However, due to the current economic climate and increased demand on the UC Trust Fund, the trust fund fell into deficit in August 2009. AWI began the request process in July for an advance from the federal government in order to maintain the solvency of the trust fund. As of January 31, 2011, the state has requested over $2 billion in federal advances in order to continue to fund unemployment compensation claims.[50]
Advances are requested for 3-month periods at a time, prior to the quarter in which they are needed. The USDOL evaluates the state's request and sends a confirmation letter that provides the authorized amount that the state may borrow and the authorization period. The state may not borrow more funds than the authorized amount. The state will only draw down, or borrow, funds as needed to pay UC benefits.

Advance monies may only be used to pay UC benefits. For example, if an employer is due a credit for overpayment of UC taxes, the employer cannot be repaid until the trust fund is replenished with funds other than advance monies.

The state may make repayments of the principal amount of the advance voluntarily by notifying USDOL by letter of the amount and effective repayment date. Repayments are made on a last made, first repaid basis.

Federal Advance – FUTA Credit Loss

After a state UC trust fund borrows from the USDOL, if the loan becomes delinquent, the federal tax credit for the state's employers is reduced until the loan is repaid (reduced by 0.3 percent for each year).[51] This serves as a sort of automatic loan repayment – the taxes collected due to the credit reduction go towards repayment of the principal amount of the state's advances. Thus, employers in states with insolvent trust funds are faced with multiple tax increases: increased state UC taxes to restore solvency of the state UC trust fund, and increased federal taxes to repay federal loans. In addition, any grants related to the costs of administration held in the UC trust fund do not earn interest.

It is anticipated that Florida employers will experience a partial loss of the federal UC tax credit for wages paid in 2011, due to the existence of an outstanding federal advance. The credit reduction continues and escalates until such time as the loan is fully repaid.[52] The Office of Economic and Demographic Research (EDR) estimated that the first repayment to the federal government through the loss of the federal credit will be $139.8 million in January 2012, $290.4

[49] Emerging Issues Related to Florida's Unemployment Compensation Program, The Florida Senate Committee on Commerce, Issue Brief 2010-306 (October 2009).
[50] See U.S. Department of Treasury, Bureau of Public Debt, Treasury Direct's Title XII Advance Activities Schedule at http://www.treasurydirect.gov/govt/reports/tfmp/tfmp_advactivitiessched.htm (last visited 2/1/2011).
[51] If a state has an outstanding loan balance on January 1 for 2 consecutive years, then the entire loan must be repaid before November 10 of the second year or the credit reduction will begin.
[52] USDOL Webinar on Title XII Advances, August 10, 2009 (slides on file with the Senate Commerce Committee).

million in January 2013, and $451.8 million in January 2014, for a total of $882 million.[53] The forecast estimates that the federal advances will be completely repaid by April 2014.

States with outstanding loans may seek relief from the loss of the federal UC tax credit. If specific requirements are met, then a cap (or limit) on the credit reduction may be put in place. These requirements are:

- The state did not take any action in the prior year that would diminish the solvency of the state fund;
- The state did not take any action in the prior year that would decrease the state's unemployment tax effort;
- The average tax rate for the taxable year exceeds the 5-year average benefit cost rate; and
- The state's outstanding loan balance as of September 30 of the tax year is not greater than that for the third preceding September 30.[54]

Federal Advance – Interest

Federal advances accrue interest at an annual interest rate of up to 10 percent. Interest accrues on a federal fiscal year basis (October to September), and is due no later than September 30 each year. The interest rate charged is equal to the fourth calendar quarter yield on the Unemployment Trust Fund for the previous year, capped at 10 percent. The interest rate for 2011 is 4.0869 percent. Through December 2010, federal advances did not accrue interest due to a provision in the American Recovery and Reinvestment Act of 2009.

The interest due on advances cannot be paid from funds from the UC Trust Fund. In order to repay the interest, a state may make an appropriation from general revenue, issue bonds, or impose a surcharge on employers.[55] In 2010, the Legislature implemented legislation to pay interest on federal advances through an additional employer assessment.[56]

The Revenue Estimating Conference is charged with estimating the interest amount by December 1 of the year prior to the due date for the interest payment. DOR must make the assessment prior to February 1 of the year. The interest is due based upon a formula. To determine the additional rate for the assessment, the formula divides the estimated amount of interest owed by 95 percent of total wages paid by employers for the previous year ending June 30. To determine an employer's payment, the formula multiplies an employer's taxable wages by the additional rate. An employer has 5 months to pay the assessment, by June 30, and the assessment may not be paid by installment.

The first interest payment to the federal government will be due by September 30, 2011; the Governor or his designee directs DOR to make the interest payment. The Revenue Estimating

[53] Unemployment Compensation Trust Fund Forecast dated February 2011, Office of Economic and Demographic Research, on file with the Senate Commerce and Tourism Committee.
[54] USDOL, Unemployment Compensation: Federal-State Partnership, page 7, available at http://ows.doleta.gov/unemploy/pdf/partnership.pdf (last visited 2/2/2011).
[55] The option of issuing bonds to repay the interest may be unavailable to Florida. See Art. VII, s. 11, Fla. Const.
[56] Section 443.131(5), F.S. Section 4, ch. 2010-1, L.O.F.

Conference estimated a payment of $61.4 million due in 2011; calculated as a per employee rate, the assessment is about $9.51 per employee.[57]

The assessments are paid into the Audit and Warrant Clearing Trust Fund and may earn interest; any interest earned will be part of the balance available to pay the interest to the federal government. If the federal government postpones or forgives the interest due on the advances, the employer assessment is eliminated for that year. An assessment already paid will be credited to the employer's account in the UC Trust Fund.

States may apply to USDOL for deferrals of interest for loans in certain situations. These include:[58]

- Interest may be deferred, to December 31 of the following calendar year, for loans made in the last 5 months of the federal fiscal year (May-September). Interest accrues on the delayed interest payment.
- States with an average total unemployment rate (TUR) of 13.5 percent or greater for the most recent 12-month period for which data are available may delay payment of interest for a grace period not to exceed 9 months. Interest does not accrue on the delayed interest payment.
- States with an average insured unemployment rate (IUR) of 7.5 percent or greater during the first 6 months of the preceding calendar year may pay interest in four annual installments of 25 percent per year. Interest does not accrue on the deferred interest payments.

If the interest is not paid when due, the federal government will not certify the state program and can withhold all administrative funding. Additionally, employer tax rates would increase to the total federal tax of 6.2 percent because Florida employers would lose the entire FUTA tax credit (5.4 percent).[59]

Temporary State Extended Benefits

In 2990, the Legislature enacted a temporary state extended benefits program for unemployed individuals in order to qualify for federal funds.[60] Under this program, the federal government pays 100 percent of temporary state extended benefits to former private sector employees. The federal funds are paid from a separate federal general revenue account and did not affect the balance of Florida's UC Trust Fund.

Since the implementation of the temporary state extended benefits program in the American Recovery and Reinvestment Act of 2009, the existence of the program has been extended several times by the federal government. Most recently, in December 2010, Congress extended the

[57] Revenue Estimating Conference forecast from November 30, 2010, available at http://edr.state.fl.us/Content/revenues/reports/unemployment-compensation-trust-fund/index.cfm (last visited 2/1/2011).
[58] USDOL, Unemployment Compensation: Federal-State Partnership, page 8. Currently, Florida does not qualify for a deferral.
[59] Id. Because the state UC program would not be certified, there would be no state UC tax in this situation.
[60] Chapter 2009-99, L.O.F. Temporary extended benefits was originally created and funded by the American Recovery and Reinvestment Act of 2009 (Recovery Act). Section 2005, Public L. No. 111-5.

eligibility window for Emergency Unemployment Compensation (EUC) and for state extended benefits through January 4, 2012.

Florida already had an extended benefits program in statute,[61] but in order to participate in the federal program, Florida had to enact a temporary state extended benefits program with an alternate trigger rate based upon the average total unemployment rate (TUR). Florida's regular state extended benefits program triggers "on" based upon a higher individual unemployment rate (IUR). In the past, the program has generally been set forth in state statute, adopted by the Legislature. However, when Congress extended this program in July 2010, because the Legislature was not in session, Governor Crist signed an executive order implementing the program.[62] On December 17, 2010, Governor Crist signed an additional executive order extending the program after the federal bill was signed into law.[63] However, the most recent extension put into law enacts a new "trigger" to keep the program "on" due to the continued high unemployment rates that many states are experiencing.

III. Effect of Proposed Changes:

Providers Representing Clients on Tax Matters

Section 1 amends s. 213.053(4), F.S., to allow payroll service providers (like employee leasing companies) to file a memorandum of understanding if they provide services for 100 or more employers.

Under current law, providers that represent clients on UC tax matters before DOR must file a power of attorney for each of their clients. If the provider provides services for at least 500 clients, the law permits the provider to file a single memorandum of understanding with DOR in lieu of the 500 individual powers of attorney. For providers that have fewer than 500 clients, completing individual powers of attorney is very burdensome. This change would reduce the burden on providers and reduce administrative burdens on DOR.

State Unemployment Compensation Benefit Eligibility

The CS makes several changes to UC benefit eligibility, including changing the qualifying criteria and circumstances that automatically disqualify claimants from receiving benefits.

Qualifying Criteria

Initial Skills Review

Section 3 amends s. 443.091(1), F.S., to amend the reporting requirement to require claimants to participate in an initial skills review. The administrator or operator of the online education or training program is required to report to AWI that the individual has taken the initial skills test for benefit eligibility purposes, and to the regional workforce board or One-Stop Career Center the results of the initial skills test for purposes of reemployment services. The regional workforce

[61] Section 443.1115, F.S.
[62] Executive Order No. 10-170.
[63] Executive Order No. 10-276.

board is required to develop a plan to use the initial skills review to refer individuals training and employment opportunities.

Section 2 amends s. 443.036, F.S., to create a new definition for "initial skills review." An initial skills review is an online education or training program, like Florida Ready to Work,[64] that is approved by AWI and designed to measure an individual's mastery of workplace skills.

Florida Ready to Work is an employee credentialing program that is funded by the state.[65] To participate, individuals must first go to a local assessment center to sign up for the program. Once signed up, an individual may take the initial skills review at the assessment center or online at any location with Internet access. The assessment measures general skills necessary for 90 percent of all jobs in 3 areas: locating information, reading, and applied math. All the questions are based on workplace scenarios. After taking the initial skills review, an individual may take additional course material to try to improve his or her skills. An individual who completes the entire program may receive a Florida Ready to Work Credential to use as a tool when applying for jobs. This program is provided to Floridians at no cost.

Section 11 amends s. 443.151(2)(a), F.S., to require claimants to file initial and continuing claims by the Internet. By requiring claimants to file UC claims by the Internet, the initial skills review could be incorporated into the benefit application process. This would allow claimants to participate in the initial skills review at the time they file for benefits and engage in reemployment services.

Work Search Requirements

Section 3 of the CS also amends s. 443.091, F.S., to add specific work search requirements. Section 443.091(1)(d), F.S., is amended to specify that as part of being available for work, a claimant must be actively seeking work. A claimant is required to engage in a systematic and sustained effort to find work, including contacting at least five prospective employers each week. AWI may require a claimant to provide evidence of work search activities to the One-Stop Career Center as part of reemployment services. Additionally, the agency is directed to conduct random reviews of work search information provided by claimants.

The CS also amends the reporting requirements for claimants related to their activities in searching for work. Section 3 amends s. 443.091(1)(c), F.S., to specify that a claimant must report, at a minimum, the name, address, and telephone number of each prospective employer contacted as part of the claimant's search for work. Section 5 amends s. 443.111(1)(b), F.S., to require each claimant to attest that she or he has been seeking work and has contacted at least five prospective employers for each week of unemployment claimed.

Section 11 amends s. 443.151(2)(a), F.S., to require claimants to file initial and continuing claims by the Internet. Claimants receiving temporary state extended benefits are required to meet heightened work search requirements, including the requirement to "furnish tangible evidence that she or he actively engaged in a systematic and sustained effort to find work."[66]

[64] Section 1004.99, F.S.
[65] Website available at http://floridareadytowork.com/ (last visited 2/2/2011).
[66] Section 443.1115(3)(c)1.b., F.S.

These claimants are required to file their claims by mail or Internet. By imposing the same type of work search requirements on all claimants, restricting filing methods for continuing claims to the Internet will allow AWI to collect the work search evidence required by s. 443.091(1), F.S., as amended by the CS.

Suitable Work

An individual is required to search for "suitable work" to be eligible for benefits under current law. Additionally, if an individual is found to not be searching for suitable work, she or he may be disqualified for benefits. As it relates to the wages paid by suitable work, under current law, specifically for the 26th week of benefits, "suitable work" is defined as "a job that pays the minimum wage and is 120 percent or more of the weekly benefit amount the individual is drawing."[67]

Section 4 of the CS amends s. 443.101(2), F.S., (renumbered in the CS as s. 443.101(3),F.S.) to require that the wage criteria for suitable work applies after 19 weeks of benefits.

Amendments made in Section 4 of the CS do not change the other current law criteria that AWI considers when determining if work is suitable or not. These include the degree of risk to the individual's health, safety, and morals; the individual's physical fitness, prior training, experience, prior earnings, length of unemployment, and prospects for securing local work in his or her customary occupation; and the distance of available work from the individual's residence.

The CS also amends s. 443.036(6), F.S., in Section 2 to provide consistency throughout the chapter to use the term "suitable work."

Earned Income

Under s. 443.036, F.S., "earned income" means gross remuneration derived from work, professional service, or self-employment. It includes commissions, bonuses, back pay awards, and the cash value of all remuneration paid in a medium other than cash. Earned income does not include income derived from invested capital or ownership of property.

An individual who receives earned income in any week is considered to be partially unemployed and his or her weekly benefit amount is reduced by any earned income received that week if it is over a certain amount.[68]

Section 2 of the CS amends the definition of "earned income" to include back pay settlements, front pay, and front wages. This expands the types of income that would reduce the amount of benefits a claimant may receive.

In general, front pay, or front wages, is an equitable remedy applied in employment discrimination cases where a court determines that an individual cannot be placed back into the

[67] Section 443.101(2), F.S.
[68] Section 443.111(4)(b), F.S.

same employment.[69] "Back pay settlements are a common remedy for wage violations that consist of an order that the employer make up the difference between what the employee was paid and the amount he or she should have been paid."[70]

Disqualifications

Voluntarily Quitting

Under current law, an individual who voluntarily quits work without good cause attributable to his or her employer is disqualified from receiving UC benefits. Section 4 of the CS amends s. 443.101(1)(a)1., F.S., to codify case law which states that "good cause" is that which would compel a reasonable individual to cease working.[71]

Misconduct

Section 2 amends s. 443.036(29), F.S., to change the definition of "misconduct."

Under current law, a claimant may be disqualified from receiving benefits for being fired for misconduct associated with work. The current law definition of "misconduct" requires showing:

- Willful or wanton disregard of an employer's interests and is found to be deliberate, or
- Careless or negligent behavior that manifests culpability, wrongful intent, or evil design or was intentional or substantial disregard.

The CS reduces the standard to show misconduct to behavior that is a "conscious" disregard of an employer's interests or that is careless or negligent behavior that manifests culpability, wrongful intent, or shows an intentional and substantial disregard of an employer's interests. Further, behavior that is a "conscious" disregard may be a violation of reasonable standards that an employer has a right to expect, including those lawfully set forth in an employer's written rules of conduct.

USDOL may find this provision causes the state to be out of conformity with federal law.

Gross Misconduct

Section 4 amends 443.101, F.S., to create a new disqualification for benefits for specific acts of "gross misconduct" by an employee that led to her or his termination from work. Some of the specific acts included are:

- Willful or reckless damage to an employer's property that results in damage of more than $50;
- Theft of employer, customer, or invitee property;

[69] Equal Opportunity Employment Commission, Front Pay, available at http://www.eeoc.gov/federal/digest/xi-7-4.cfm (last visited 2/22/2011).
[70] USDOL, ETA, Wages: Back Pay, available at http://www.dol.gov/dol/topic/wages/backpay.htm (last visited 2/22/2011).
[71] See e.g. Thomas v. Peoplease Corp., 877 So.2d 45(3rd DCA, 2004).

- Violation of drug and alcohol policies, testing, or use of such substances while on the job or on duty;
- Criminal assault or battery of another employee, customer, or invitee;
- Abuse of a patient, resident, disabled person, elderly person, or child in the employee's professional care;
- Insubordination (willful failure to comply with written employer rule or job description or reasonable order of a supervisor), provided that an employee receives at least one written warning before being terminated;
- Willful neglect of duty as described in a written employer rule or job description, provided that an employee receives at least one written warning before being terminated; and
- Failure to maintain a license, registration, or certification required by law for the employee to perform her or his job.

The disqualification for gross misconduct continues until an individual becomes reemployed and earns income of at least 17 times his or her weekly benefit amount that would have otherwise been available.

Severance Pay

Section 4 of the CS creates a disqualification in s. 443.101(3), F.S., (renumbered in the CS as s. 443.101(4), F.S., for any week in which an individual receives severance pay. Severance pay is often granted to employees upon termination of employment, and is usually based on length of employment (matter of agreement between an employer and an employee). The CS provides for a calculation for the duration of disqualification, beginning from the date an individual separated from that employer.

Criminal Acts and Incarceration or Imprisonment

Currently, under s. 443.101(9), F.S., an individual who is terminated from employment for violation of a criminal law punishable by imprisonment (either by conviction or entrance of a plea of guilty or nolo contendere) in connection with work is disqualified for benefits. This includes a violation of a criminal law under any jurisdiction.

The CS amends this disqualification in Section 4 of the CS by expanding the disqualification to a violation of any criminal law, not just those punishable by imprisonment, and includes being fired for violating a crime which affects an employee's ability to do his or her job.

USDOL may find this provision causes the state to be out of conformity with federal law.

Further, Section 4 creates a new disqualification for each week that an individual is unavailable for work due to incarceration or imprisonment in s. 443.101(12), F.S.

State Unemployment Compensation Contributions

Quarterly Contributions – Installment Payments

As discussed in the Present Situation, employer contributions are due in the month following the end of the quarter (April 30, July 31, October 31, and January 31). Most employers will have paid the $7,000 wage base to their employees in the first or second quarter of the year, making their annual UC payment due early in the year. Under current law, for 2011, employers may choose to participate in an alternative payment plan for an administrative fee of up to $5 to participate.

Section 10 amends 443.141, F.S., to allow this option for UC taxes due in 2012, 2013, and 2014.

Temporary State Extended Benefits Program

In December, Congress extended the time that the federal government would fund 100 percent of state extended benefits for former private sector employers through January 4, 2012.[72] There is no cost to private employers; however, "reimbursable" employers like state and local governments are not covered by the federal government and must pay for the benefits themselves. These benefits are not charged to employers and have no effect on an employer's experience rating.

Section 7 revives, readopts, and amends s. 443.1117, F.S., to extend the duration of the temporary state extended benefits program. The section expired on April 5, 2010. When Congress extended the program in December 2010, Governor Crist signed Executive Order No. 10-276 extending the program. This CS codifies that executive order and revives the statute through January 4, 2012, in order for Floridians to be eligible for 100 percent federal funding for benefits for former private sector employees. Additionally, the CS conforms s. 443.1117, F.S., to federal law by putting into place the new "trigger" permitted.

This section is effective retroactive to December 17, 2010, and expires on January 4, 2012. The section contains an expiration date, because under the federal program, after January 4, 2012, any extended benefits paid will only be reimbursed by the federal government at a rate of 50 percent for former private sector employees making new claims. The CS sets a sunset date in enacting the program in order to take the best advantage of the program.

Section 8 clarifies that the temporary extended benefits will be available to unemployed Floridians who establish entitlement to extended benefits between December 17, 2010, and January 4, 2012.

Employee Leasing Companies

An employee leasing company is "a form of business entity engaged in an arrangement whereby the entity assigns its employees to a client and allocates the direction of and control over the

[72] Pub. L. No. 111-312.

leased employees between the leasing company and the client."[73] The leasing company provides services for the client companies, such as handling the filing of UC taxes and workers' compensation.

Under current law, employee leasing companies are required to report leased employees under the leasing company's UC tax account and contribution rate.

Section 9 amends s. 443.1216(1)(a), F.S., to allow the employee leasing company to report leased employees under the accounts of its clients for unemployment tax purposes only. The CS allows a one-time election to change an employee leasing company's reporting and contribution method. The leasing company is required to notify AWI or the tax collection service provider of such election and provide certain information. The election is binding on all clients of the leasing company, as well.

USDOL may find this provision causes the state to be out of conformity with federal law.

Appeals

Section 11 amends s. 443.151(4)(e), F.S., relating to appeals of decisions by the Unemployment Appeals Commission.

Generally, if an appellant files a notice of appeal with the commission, the commission files the appeal with the appropriate district court of appeal. The decision of where to file is based upon where the appeals referee was located and the decision was mailed.[74] An appeal must be filed within 30 days of the issuance of the commission's order.

The CS provides that appeals should be filed in the district court where the appellant is located: if claimant is appellant, then where the claimant resides; if business is the appellant, then where the business is located. If the claimant does not reside in Florida or the business is not located in Florida, then the appeal is filed where the order of the commission was issued.

Section 11 also amends s. 443.151(4)(b), F.S., to create a new subparagraph which codifies certain rules of AWI related to the exclusion of evidence that is irrelevant or repetitious,[75] and revises the admissibility of hearsay evidence to allow it to be used to establish a fact under certain circumstances.

Section 12 amends s. 443.171, F.S., to create a new subsection to create a rebuttable presumption that the date on a document mailed by AWI or its tax collection service provider (DOR) is considered the date the document was mailed, absent any evidence provided to the contrary.

[73] Department of Business and Professional Regulation, definitions, available at http://www.myfloridalicense.com/dbpr/pro/emplo/codes.html (last visited 2/2/2011).
[74] See Unemployment Appeals Commission, Appealing a UAC Order to a District Court of Appeal, available at http://www.uac.fl.gov/HowTo02.html (last visited 2/2/2011).
[75] 60BB-5.024, F.A.C.

Overpayments

Overpayments are UC benefits that cannot be charged against any employer's account. These costs are recovered through a noncharge factor that socializes the cost of the overpayments among all contributory employers who had benefit experience over the previous 3 years (discussed above in the Present Situation).

Section 11 amends s. 443.151(6), F.S., to create a provision which limits the amount of overpayments that AWI can attempt to collect from a claimant who receives benefits that she or he was not eligible to receive in a situation where notice of nonmonetary determination was not provided within 30 days of filing a new claim. The agency is limited to recollect of up to 5 weeks of benefits.

Other

Various sections of the CS also include changes correcting cross-references. Specifically, Section 6 amending s. 443.1115, F.S., is included for purposes of correcting a cross-reference.

Section 13 states that the Legislature finds that this act fulfills an important state interest.

Section 14 provides that this act shall take effect upon becoming law. Specifically, in the CS:

- Sections 2, 3, 4, 5, 6, 9, and 11 are effective July 1, 2011.
- Section 7 is effective upon becoming law and retroactive to December 17, 2010.

Other Potential Implications:

USDOL has broad oversight for the UC program, including determining whether a state law conforms to federal UC law and whether a state's administration of the UC program substantially complies with processes and procedures approved by USDOL. States are permitted to set benefit eligibility requirements, the amount and duration of benefits, and the state tax structure, as long as state law does not conflict with FUTA or Social Security Act requirements. When a state's UC law conforms to the requirements of the Social Security Act, the state is eligible to receive federal administrative grants to operate the state's UC program. When a state's UC law conforms to the requirements of the FUTA, employers in the state may receive a credit of up to 5.4 percent against the federal unemployment tax rate of 6.2 percent.

The Secretary of USDOL is responsible for determining if a state's UC law meets the requirements of federal law. Under FUTA, the secretary annually certifies the state's compliance with federal requirements and this certification ensures that employers in the state are eligible for the full credit against the federal unemployment tax.

USDOL may find various provisions of this CS to be out of conformity with federal law. If USDOL made such a finding, then it would not certify the state's UC program and could withhold all administrative funding or cause the employer federal tax rates to increase to the total 6.2 percent because of loss of the entire FUTA tax credit.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Section 18, Article VII of the Florida Constitution, excuses counties and municipalities from complying with laws requiring them to spend funds or to take an action unless certain conditions are met.

To the extent, this CS requires cities and counties to expend funds to pay state extended benefits for eligible former employees through the end of 2011, the provisions of Section 18(a), Article VII of the State Constitution may apply. If those provisions do apply, in order for the law to be binding upon the cities and counties, the Legislature must find that the law fulfills an important state interest (see Section 14 of the CS) and one of the following relevant exceptions:

a. Appropriate funds estimated at the time of enactment to be sufficient to fund such expenditures;
b. Authorize a county or municipality to enact a funding source not available for such local government on February 1, 1989, that can be used to generate the amount of funds necessary to fund the expenditures;
c. The expenditure is required to comply with a law that applies to all persons "similarly situated," including state and local governments; or
d. The law is either required to comply with a federal requirement or required for eligibility for a federal entitlement.

"Similarly situated" refers to those laws affecting other entities, either private or governmental, in addition to counties and municipalities. Because the CS would impact "all persons similarly situated," this exception appears to apply.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

On March 4, the Revenue Estimating Conference adopted the following consensus estimate for the fiscal impact of the committee substitute:

	State Trust			
	FY 2011-12 Cash	FY 2012-13 Cash	FY 2013-14 Cash	FY 2014-15 Cash
UC Tax	(130.9)	(17.6)	(22.5)	32.9

Employer Interest Assessments	(1.7)	(7.4)	(7.2)	0
Installment Fees	.1	.1	.1	0

The conference estimated that, when analyzed together and compared to current law, the various changes to the unemployment compensation law made by the CS on balance will result in a reduction in unemployment tax revenues to the Unemployment Compensation Trust of approximately $131 million in fiscal year 2011-12. However, the conference estimated that by fiscal year 2014-15 there would be a net UC tax gain to the trust fund of approximately $33 million. The principal factor accounting for the reduction in the first fiscal year is the proposal to allow employers to continue to have the option to pay their taxes in installments over 2012, 2013, and 2014.

An employee leasing company is allowed, under the CS, to make a one-time election to change the way it reports for purposes of the UC tax, by reporting under the account of its clients. A company will likely decide to make this election only if it is financially advantageous to the company. However, while potentially lowering a leasing company's UC taxes, such election is likely to have some negative effect on the balance of the UC Trust Fund. By changing its reporting method, the taxes due to the UC Trust Fund are anticipated to be less than when the leasing company was reporting under its own tax account. Additionally such a change may result in an increase in socialized costs.

Because it is anticipated that the CS will reduce the amount of borrowing by the state from the federal government, the amount of interest paid by the state to the federal government will be reduced. In turn the assessments by the state against employers to recoup the interest payments will be reduced, resulting in an estimated reduction in the amount of interest due from employers of $1.7 million in fiscal year 2011-12 and more than $7 million in each of the two subsequent fiscal years.

The $5 administrative fee to participate in the installment payment program for UC taxes is a per-year fee. The amount of money generated from the fee depends on the number of businesses electing to participate. In 2010, out of 450,000 employers, about 10,342 elected to participate in this option (representing a total of $127 million in UC taxes).[76] However, due to the expected significant increases in the UC tax in future years, more employers may elect to participate in the installment option. The Revenue Estimating Conference estimated that $100,000 would be collected in administrative fees for each of the next three fiscal years, under the assumption that 10 percent of employers will participate in the installment payment program each year.

[76] Data from Department of Revenue, on file with the Senate Commerce and Tourism Committee.

B. Private Sector Impact:

Participation in the temporary state extended benefits program is expected to bring an estimated $650 million in additional benefits to Florida.[77] Payment of these benefits comes 100 percent from federal funds. There will be no cost to private employers and there will be no effect on their contribution rates. Benefits paid by public employers, non-profits, and other reimbursable employers are not covered by federal funds (see explanation below related to Government Sector Impact for impact on public employers).

Individuals applying for benefits may have to visit their local One-Stop Career Centers or other facilities that offer Internet access in order to apply for benefits. This will expose individuals to additional reemployment services available if they visit their local One-Stop Career Center.

Changes to the qualification and disqualification criteria for UC benefits may reduce the amount of benefits paid from the UC Trust Fund to unemployed individuals, which may reduce the amount of federal advances drawn down. Additionally, these changes may reduce the amount of federal emergency and federally funded temporary state extended benefits to such individuals.

C. Government Sector Impact:

To the extent that provisions of the CS impact the conformity of Florida's UC law with federal requirements, the federal funding provided to administer the UC program could be jeopardized.

The costs to implement the requirement to review that a claimant is actively seeking work will be proportionate to the extent of the verification services, which could be extensive. AWI has preliminarily estimated that the cost to implement this provision could be as much as $2.5 million, mostly due to the need to add additional positions to verify each claimant's information. Furthermore, because AWI has a limited amount of administrative resources from USDOL, allocation of funds to implement this requirement would reduce funds for other services. AWI indicated that computer programming that would be required as a result of changes made by the CS could be funded by currently available federal grants. However, the change made by the CS requiring that claims be filed over the Internet will result in reduced administrative costs to the agency of an amount undetermined at this time.

The Florida Ready to Work program was funded by $5.3 million in nonrecurring general revenue in FY 2010-11.[78] Increasing the use of the program may result in additional costs to the state. Currently, the Department of Education contracts with a private company to use its skills assessment, training, and credentialing program. State funding allows for a certain number of assessments and credentials under the contract. To the extent that another online education or training program must be developed, reviewed, approved,

[77] Estimate from the Agency for Workforce Innovation, on file with the Senate Commerce and Tourism Committee.
[78] See s. 2, ln. 111, ch. 2010-152, L.O.F.

and implemented to address non-English speaking claimants, there may be a fiscal impact to the state.

Additionally, currently to participate in the Florida Ready to Work program an individual must visit an assessment center in order to register with the program; not every county in Florida has an assessment center designated in it, and some assessment centers are not open to the public. Also, many regional workforce boards or One-Stop Career Centers are not Florida Ready to Work assessment centers. There may be additional costs incurred to create new assessment centers in counties or localities that do not currently have one, and to designate the regional workforce boards and One-Stop Centers as assessment centers in order to provide access to the program to UC claimants. The amount of such costs had not been determined at this time. To the extent that the initial skills review can be integrated into the process for applying for benefits, as the CS requires claims to be filed by the Internet, this may eliminate any potential costs of creating new assessment centers.

Related to the provisions of the CS that affect the tax, the Department of Revenue estimates the following costs to implement the employee leasing company reporting option: $227,340 in FY 2010-2011; and a recurring impact of $198,676.

The total cost in FY 2010-2011 includes:

- Related to the provisions which an employee leasing company to make a one-time election to change the way it reports:
  - $280 in nonrecurring costs for tax information publication printing and mailing;
  - $98,400 in nonrecurring costs to modify the SUNTAX system;
  - $113,152 in recurring and $15,508 in nonrecurring costs to hire 4 new revenue specialists III due to a predicted significant workload increase to process the reporting changes;
- DOR estimates that the necessary changes to modify the SUNTAX system to extend the installment payment program for UC taxes for 2012, 2013, and 2014 could be done in-house with existing resources.

The recurring cost of $198,676 is for the 4 new positions to process the employee leasing company elections.

The Unemployment Appeals Commission has indicated that the commission may incur increased costs due to changes made in the CS related to where appeals may be filed. Courts have held that the Unemployment Appeals Commission is prohibited from charging claimants for provision of a transcript or a copy of the record of the agency hearing in their unemployment cases, under s. 443.041(2)(a), F.S.[79] Thus, to the extent that appeals are filed in district courts of appeal that require or request a transcript automatically when a case is filed, the Unemployment Appeals Commission may incur additional costs. In 2010, the commission spent more than $51,000 to prepare transcripts for appeals filed in district courts of appeal. Also, to the extent that employees of the

[79] Gretz v. Florida Unemployment Appeals Commission, 572 So.2d 1384 (Fla. 1991).

commission are required to make personal appearances in court, the commission may incur additional expenses related to travel.

The commission also noted that, in cases in which appeals are initially filed with the commission and need to be forwarded to the appropriate district court of appeal, the commission may expend time to identify where the job separation occurred or the claimant's current address in order to determine the appropriate district court. Additionally, as a general proposition the commission noted that some of the revisions to qualifying requirements and disqualifying criteria under the CS (e.g., changes relating to misconduct) may result in an increase in the number of appeals, generating additional staff costs.

Extended benefits for former state and local employees do not qualify for federal funding due to the fact that these entities are self-insured and the federal law does not allow for their participation in federal sharing. The temporary extended benefits for these former employees must be paid by the governmental entity. The extension enacted on December 17, 2010, is estimated to cost a total of $18.4 million, approximately $5.4 million from state funds and $13 million from local government funds.[80] In order to participate in federal sharing, the temporary state extended benefits program had to encompass unemployed individuals of both the private and public sectors.

VI. Technical Deficiencies:

The specific acts set forth in the definition of "gross misconduct," in Section 5 of the CS, do not include violation of an employer's written policy disallowing any drug use whatsoever, including the use of drugs while off the job or off duty. Further, while a disqualification for simple misconduct carries a penalty measured in weeks as well as an earnings requirement, disqualifications for gross misconduct only impose an earnings requirement.

The new disqualification for being unavailable for work due to incarceration or imprisonment raises due process concerns related to individuals who are incarcerated or imprisoned due to mistaken identity, for example.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce on February 22, 2011:
Specifically the strike-all is different from the bill as filed in the following ways:

- Maximum Rate: The increase to the maximum rate is removed from the bill;

[80] Estimates from the Agency for Workforce Innovation, on file with the Senate Commerce and Tourism Committee.

- Construction: In response to preliminary comments from the U.S. Department of Labor, removes the portion changing the construction of the chapter to neutrally construed;
- Earned Income: Includes back pay settlements, front pay, and front wages in the definition of earned income, and receipt of this income would reduce an individual's weekly benefit amount;
- Initial Skills Review: In response to preliminary comments from the U.S. Department of Labor, the CS:
  - Adds a definition of "initial skills review";
  - Requires participation in the "initial skills review" as part of the reporting requirements for benefits;
  - Allows for exceptions for individuals who are illiterate or have language barriers;
  - Requires the workforce boards to use the initial skills reviews to develop a plan for referring individuals to training and employment opportunities;
- Actively Seeking Work/Work Search Requirements: The CS changes the provisions for actively seeing work to:
  - Require each claimant to report the name, address, and telephone number of each prospective employer contacted for each week of benefits claimed;
  - Require each claimant to contact at least five prospective employers;
  - Direct AWI to conduct random audits, to keep the estimated costs to the system at a reasonable level (including administrative dollars and personnel time to verify the information);
- Gross Misconduct: Specifies that for insubordination and willful neglect, that the employee has received at least one written warning from the employer;
- Suitable Work: Instead of creating new criteria, the bill now simply amends current law such that after 19 weeks of benefits, "suitable work" is work that pays minimum wage + 120% of the claimant's weekly benefit amount;
- Severance Pay: Specifies that the calculation is based upon the average wage that the individual received from the employer who paid the severance pay;
- Incarceration or Imprisonment: In response to preliminary comments from the U.S. Department of Labor, the bill is amended to disqualify an individual for any week in which the individual is unavailable for work due to incarceration or imprisonment;
- Employee Leasing Companies: In response to preliminary comments from the U.S. Department of Labor, and comments from DOR, the CS adds specificity:
  - Requires a reporting election be made by August 1, to allow DOR adequate time to process the election;
  - Requires specific information in the notification to DOR that the employee leasing company is going to change its reporting requirement, including:
    - A list of each client company and its unemployment account number;
    - A list of each client company's current and previous employees, and their respective social security numbers, for the prior 3-state fiscal years;
    - All wage data and benefit charges for the prior 3-state fiscal years;
  - Specifies that the election applies to all the employee leasing company's current and future clients;
  - Specifies that the employee leasing company has to remit the quarterly reports for each client and pay contributions by approved electronic means; and

- Specifies that when a client leaves the employee leasing company, the client takes its wage and benefit history with it;

- Filing Claims: Requires claims to be filed by the Internet;
- Evidence: Codifies certain rules of AWI related to the exclusion of evidence that is irrelevant or repetitious, and revises the admissibility of hearsay evidence to allow it to be used to establish a fact under certain circumstances;
- Presumption of Mailing: Provides that the date on a document mailed by AWI or its tax collection service provider (DOR) is considered the date the document was mailed, absent any evidence provided to the contrary;
- Appeals: Simplifies the language related to appeals to specify that the appeal is filed in the district court where the appellant is located (if claimant is appellant, then where the claimant resides; if business is the appellant, then where the business is located); and
- Effective Date: Changes the effective date of the bill to "upon becoming law," and specifies certain provisions to become effective July 1, 2011, to allow the agencies to implement them.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/09/2011	.	
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The Committee on Judiciary (Richter) recommended the following:

Senate Amendment (with title amendment)

Between lines 77 and 78
insert:

Section 2. Section 443.031, Florida Statutes, is amended to read:

443.031 Rule of liberal construction.—This chapter shall be liberally construed to accomplish its purpose to promote employment security by increasing opportunities for reemployment and to provide, through the accumulation of reserves, for the payment of compensation to individuals with respect to their unemployment. The Legislature hereby declares its intention to provide for carrying out the purposes of this chapter in

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cooperation with the appropriate agencies of other states and of the Federal Government as part of a nationwide employment security program, and particularly to provide for meeting the requirements of Title III, the requirements of the Federal Unemployment Tax Act, and the Wagner-Peyser Act of June 6, 1933, entitled "An Act to provide for the establishment of a national employment system and for cooperation with the states in the promotion of such system, and for other purposes," each as amended, in order to secure for this state and its citizens the grants and privileges available under such acts. All doubts ~~in favor of a claimant of unemployment benefits who is unemployed through no fault of his or her own. Any doubt~~ as to the proper construction of any provision of this chapter shall be resolved in favor of conformity with such requirements ~~federal law, including, but not limited to, the Federal Unemployment Tax Act, the Social Security Act, the Wagner-Peyser Act, and the Workforce Investment Act~~.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 6

and insert:

understanding; amending s. 443.031, F.S.; revising provisions relating to statutory construction; amending s. 443.036, F.S.; revising the

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/09/2011	.	
	.	
	.	
	.	

The Committee on Judiciary (Flores) recommended the following:

Senate Amendment

Delete lines 175 - 201
and insert:
each prospective employer contacted, or the date the claimant reported to a one-stop career center, pursuant to paragraph (d).

2. The administrator or operator of the initial skills review shall notify the agency when the individual completes the initial skills review and report the results of the review to the regional workforce board or the one-stop career center as directed by the workforce board. The workforce board shall use the initial skills review to develop a plan for referring individuals to training and employment opportunities. The

470974

failure of the individual to comply with this requirement will result in the individual being determined ineligible for benefits for the week in which the noncompliance occurred and for any subsequent week of unemployment until the requirement is satisfied. However, this requirement does not apply if the individual is able to affirmatively attest to being unable to complete such review due to illiteracy or a language impediment.

(d) She or he is able to work and is available for work. In order to assess eligibility for a claimed week of unemployment, the agency shall develop criteria to determine a claimant's ability to work and availability for work. A claimant must be actively seeking work in order to be considered available for work. This means engaging in systematic and sustained efforts to find work, including contacting at least five prospective employers for each week of unemployment claimed. The agency may require the claimant to provide proof of such efforts to the one-stop career center as part of reemployment services. The agency shall conduct random reviews of work search information provided by claimants. As an alternative to contacting at least five prospective employers for any week of unemployment claimed, a claimant may, for that same week, report in person to a one-stop career center to meet with a representative of the center and access reemployment services of the center. The center shall keep a record of the services or information provided to the claimant and shall provide the records to the agency upon request by the agency. However:

688002

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/09/2011	.	
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	.	
	.	

The Committee on Judiciary (Richter) recommended the following:

Senate Amendment

Delete lines 324 - 338
and insert:
(f) Assault or battery of another employee or of a customer or invitee of the employer.
(g) Abuse of a patient, resident, disabled person, elderly person, or child in her or his professional care.
(h) Insubordination, which is defined as the willful failure to comply with a lawful, reasonable order of a supervisor which is directly related to the employee's employment as described in an applicable written job description, the written rules of conduct, or other lawful

688002

directive of the employer. Except in cases of severe insubordination, the employee must have received at least one written warning from the employer before being discharged from employment.

(i) Willful neglect of duty directly related to the employee's employment as described in an applicable written job description or written rules of conduct. Except in cases of severe willful neglect, the employee must have

233996

LEGISLATIVE ACTION

Senate	.	House
Comm: RS	.	
03/09/2011	.	
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	.	

The Committee on Judiciary (Flores) recommended the following:

Senate Amendment (with directory and title amendments)

Between lines 490 and 491
insert:

(a) Benefits are payable by ~~mail or electronically. Notwithstanding s. 409.942(4), the agency may develop a system for the payment of benefits by electronic funds transfer, including, but not limited to,~~ debit cards, electronic payment cards, or any other means of electronic payment that the agency deems to be commercially viable or cost-effective, except that an individual being paid by electronic funds transfer to an individual checking or savings account when another electronic payment system becomes operational may continue to be paid in

233996

that manner until the expiration of the claim. ~~Commodities or services related to the development of such a system shall be procured by competitive solicitation, unless they are purchased from a state term contract pursuant to s. 287.056.~~ The agency shall adopt rules necessary to administer this paragraph ~~the system~~.

====== D I R E C T O R Y C L A U S E A M E N D M E N T ======
And the directory clause is amended as follows:

Delete line 484

and insert:

Section 5. Effective July 1, 2011,

================ T I T L E A M E N D M E N T ================
And the title is amended as follows:

Delete line 28

and insert:

443.111, F.S.; revising the manner in which benefits are payable; eliminating payment by mail; conforming provisions to changes made

410286

LEGISLATIVE ACTION

Senate	.	House
Comm: WD	.	
03/09/2011	.	
	.	
	.	
	.	

The Committee on Judiciary (Flores) recommended the following:

Senate Substitute for Amendment (233996) (with directory and title amendments)

Between lines 490 and 491

insert:

(a) Benefits are payable by ~~mail or electronically. Notwithstanding s. 409.942(4), the agency may develop a system for the payment of benefits by electronic funds transfer, including, but not limited to,~~ debit cards, electronic payment cards, or any other means of electronic payment that the agency deems to be commercially viable or cost-effective, except that an individual being paid by paper warrant on July 1, 2011, may continue to be paid in that manner until the expiration of the

410286

claim. ~~Commodities or services related to the development of such a system shall be procured by competitive solicitation, unless they are purchased from a state term contract pursuant to s. 287.056.~~ The agency shall adopt rules necessary to administer this paragraph ~~the system~~.

====== D I R E C T O R Y C L A U S E A M E N D M E N T ======
And the directory clause is amended as follows:
Delete line 484
and insert:
Section 5. Effective July 1, 2011,

================ T I T L E A M E N D M E N T ================
And the title is amended as follows:
Delete line 28
and insert:
443.111, F.S.; revising the manner in which benefits are payable; eliminating payment by mail; conforming provisions to changes made

700036

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/09/2011	.	
	.	
	.	
	.	

The Committee on Judiciary (Flores) recommended the following:

Senate Substitute for Amendment (233996) (with directory and title amendments)

Between lines 490 and 491
insert:

(a) Benefits are payable ~~by mail or~~ electronically, except that an individual being paid by paper warrant on July 1, 2011, may continue to be paid in that manner until the expiration of the claim. Notwithstanding s. 409.942(4), the agency may develop a system for the payment of benefits by electronic funds transfer, including, but not limited to, debit cards, electronic payment cards, or any other means of electronic payment that the agency deems to be commercially viable or cost-effective.

700036

Commodities or services related to the development of such a system shall be procured by competitive solicitation, unless they are purchased from a state term contract pursuant to s. 287.056. The agency shall adopt rules necessary to administer this paragraph ~~the system~~.

====== D I R E C T O R Y C L A U S E A M E N D M E N T ======

And the directory clause is amended as follows:

Delete line 484

and insert:

Section 5. Effective July 1, 2011,

================ T I T L E A M E N D M E N T ================

And the title is amended as follows:

Delete line 28

and insert:

443.111, F.S.; revising the manner in which benefits are payable; eliminating payment by mail; providing an exception; conforming provisions to changes made

609074

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/09/2011	.	
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	.	

The Committee on Judiciary (Flores) recommended the following:

Senate Amendment

Delete line 497
and insert:
work and has contacted at least five prospective employers or reported in person to a one-stop career center for reemployment services for

358102

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/09/2011	.	
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The Committee on Judiciary (Richter) recommended the following:

Senate Amendment

Delete lines 689 - 722
and insert:
a. However, except for the internal employees of an employee leasing company, a leasing company may make a one-time election to report and pay contributions under the client method. Under the client method, a leasing company must assign leased employees to the client company that is leasing the employees. The client method is solely a method to report and pay unemployment contributions. For all other purposes, the leased employees are considered employees of the employee leasing company. A leasing company which elects the client

method shall pay contributions at the rates assigned to each client company.

(I) The election applies to all of the leasing company's current and future clients.

(II) The leasing company must notify the Agency for Workforce Innovation or the tax collection service provider of its election by August 1, and such election applies to reports and contributions for the first quarter of the following calendar year. The notification must include:

(A) A list of each client company and its unemployment account number;

(B) A list of each client company's current and previous employees and their respective social security numbers for the prior 3 state fiscal years;

(C) All wage data and benefit charges for the prior 3 state fiscal years.

(III) Subsequent to such election, the employee leasing company may not change its reporting method.

(IV) The employee leasing company must file a Florida Department of Revenue Employer's Quarterly Report (UCT-6) for each client company and pay all contributions by approved electronic means.

(V) For the purposes of calculating experience rates, the election is treated like a total or partial succession, depending on the percentage of employees leased. If the client company leases only a portion of its employees from the leasing company, the client company shall continue to report the nonleased employees under its tax rate based on the experience of the nonleased employees.


358102

(VI) A leasing company that makes a one-time election under subparagraph a is not required to submit quarterly Multiple Worksite Reports required by subparagraphs c. and d.

(VII) This sub-subparagraph applies to all employee leasing

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LEGISLATIVE ACTION

Senate	.	House
Comm: UNFAV	.	
03/09/2011	.	
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The Committee on Judiciary (Joyner) recommended the following:

Senate Amendment (with directory and title amendments)

Delete lines 78 - 147
and insert:

Section 2. Effective July 1, 2011, present subsections (5) through (25) of section 443.036, Florida Statutes, are redesignated as subsections (6) through (26) respectively, present subsections (26) through (45) of that section are redesignated as subsection (28) through (47) respectively, new subsections (5) and (27) are added to that section, and present subsections (6), (7), (9), (16), (29), and (43) of that section are amended, to read:

443.036 Definitions.—As used in this chapter, the term:

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(5) "Alternative base period" means the last four completed calendar quarters immediately preceding the first day of an individual's benefit year.

(7) ~~(6)~~ "Available for work" means actively seeking and being ready and willing to accept suitable work ~~employment~~.

(8) ~~(7)~~ "Base period" means the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year. If the agency determines, pursuant to s. 443.091(1)(g), that an alternative base period will be used, the term has the same meaning as the alternative base period.

(10) ~~(9)~~ "Benefit year" means, for an individual, the 1-year period beginning with the first day of the first week for which the individual first files a valid claim for benefits and, thereafter, the 1-year period beginning with the first day of the first week for which the individual next files a valid claim for benefits after the termination of his or her last preceding benefit year. Each claim for benefits made in accordance with s. 443.151(2) is a valid claim ~~under this subsection~~ if the individual was paid wages for insured work in accordance with s. 443.091(1)(g) and is unemployed ~~as defined in subsection (43)~~ at the time of filing the claim. However, the Agency for Workforce Innovation may adopt rules providing for the establishment of a uniform benefit year for all workers in one or more groups or classes of service or within a particular industry if the agency determines, after notice to the industry and to the workers in the industry and an opportunity to be heard in the matter, that those groups or classes of workers in a particular industry periodically experience unemployment resulting from layoffs or


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shutdowns for limited periods of time.

(17) ~~(16)~~ "Earned income" means gross remuneration derived from work, professional service, or self-employment. The term includes commissions, bonuses, back pay awards or back pay settlements, front pay or front wages, and the cash value of all remuneration paid in a medium other than cash. The term does not include income derived from invested capital or ownership of property.

(27) "Initial skills review" means an online education or training program, such as that established under s. 1004.99, which is approved by the Agency for Workforce Innovation and designed to measure an individual's mastery level of workplace skills.

(31) ~~(29)~~ "Misconduct" includes, but is not limited to, the following, which may not be construed in pari materia with each other:

(a) Conduct demonstrating conscious ~~willful or wanton~~ disregard of an employer's interests and found to be a deliberate violation or disregard of reasonable ~~the~~ standards of behavior which the employer has a right to expect of his or her employee, including standards lawfully set forth in the employer's written rules of conduct; or

(b) Carelessness or negligence to a degree or recurrence that manifests culpability or~~,~~ wrongful intent, ~~or evil design~~ or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

(45) ~~(43)~~ "Unemployment" or "unemployed" means:

(a) An individual is "totally unemployed" in any week

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during which he or she does not perform any services and for which earned income is not payable to him or her. An individual is "partially unemployed" in any week of less than full-time work if the earned income payable to him or her for that week is less than his or her weekly benefit amount. The Agency for Workforce Innovation may adopt rules prescribing distinctions in the procedures for unemployed individuals based on total unemployment, part-time unemployment, partial unemployment of individuals attached to their regular jobs, and other forms of short-time work.

(b) An individual's week of unemployment commences only after ~~his or her~~ registration with the Agency for Workforce Innovation as required in s. 443.091~~, except as the agency may otherwise prescribe by rule~~.

Between lines 235 and 236

insert:

(g) She or he has been paid wages for insured work equal to 1.5 times her or his high quarter wages during her or his base period, except that an unemployed individual is not eligible to receive benefits if the base period wages are less than $3,400. If the individual is ineligible for benefits calculated on a base period wage, wages must be calculated using an alternative base period and the claimant must have the opportunity to choose whether to establish a claim using such wages. Wages shall be calculated for an alternative base period only if the base period wages are inadequate to establish eligibility under this paragraph and only for benefit years that begin on or after January 1, 2011. Wages used to establish a monetarily eligible

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benefit year may not be used to establish monetary eligibility in a subsequent benefit year.

Delete lines 895 - 930

and insert:

(a) *Notices of claim.*—The Agency for Workforce Innovation shall promptly provide a notice of claim to the claimant's most recent employing unit and all employers whose employment records are liable for benefits under the monetary determination. The employer must respond to the notice of claim within 20 days after the mailing date of the notice, or in lieu of mailing, within 20 days after the delivery of the notice. If a contributing employer fails to timely respond to the notice of claim, the employer's account may not be relieved of benefit charges as provided in s. 443.131(3)(a), notwithstanding paragraph (5)(b). The agency may adopt rules as necessary to administer ~~implement~~ the processes described in this paragraph relating to a notice ~~notices~~ of claim.

(b) *Monetary determinations.*—In addition to the notice of claim, the Agency for Workforce Innovation must ~~shall~~ also promptly provide an initial monetary determination to the claimant and each base period employer whose account is subject to being charged for its respective share of benefits on the claim. The monetary determination must include a statement of whether and in what amount the claimant is entitled to benefits, and, in the event of a denial, must state the reasons for the denial. A monetary determination for the first week of a benefit year must also include a statement of whether the claimant was paid the wages required under s. 443.091(1)(g) and, if so, the


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first day of the benefit year, the claimant's weekly benefit amount, and the maximum total amount of benefits payable to the claimant for a benefit year. The monetary determination is final unless within 20 days after the mailing of the notices to the parties' last known addresses, or in lieu of mailing, within 20 days after the delivery of the notices, an appeal or written request for reconsideration is filed by the claimant or other party entitled to notice. The agency may adopt rules as necessary to implement the processes described in this paragraph relating to notices of monetary determinations and the appeals or reconsideration requests filed in response to such notices.

(c) *Determinations involving an alternative base period.*—In the case of a claim for benefits involving an alternative base period under s. 443.091(1)(g), if the agency is unable to access wage information through the database of its tax collection service provider, the agency shall request the information from the employer by mail. The employer must provide the requested information within 10 days after the agency mails the request. If wage information is unavailable, the agency may base the determination on an affidavit submitted by the individual attesting to her or his wages for those calendar quarters. The individual must furnish payroll information, if available, in support of the affidavit. Benefits based on an alternative base period must be adjusted if the quarterly report of wage information received from the employer under s. 443.141 results in a change in the monetary determination.

(d) ~~(c)~~ *Nonmonetary determinations.*—If the agency receives information that may result in a denial of benefits, the agency must complete an investigation of the claim required by


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subsection (2) and provide notice of a nonmonetary determination to the claimant and the employer from whom the claimant's reason for separation affects his or her entitlement to benefits. The determination must state the reason for the determination and whether the unemployment tax account of the contributing employer is charged for benefits paid on the claim. The nonmonetary determination is final unless within 20 days after the mailing of the notices to the parties' last known addresses, or in lieu of mailing, within 20 days after the delivery of the notices, an appeal or written request for reconsideration is filed by the claimant or other party entitled to notice. The agency may adopt rules as necessary to administer ~~implement~~ the processes described in this paragraph relating to notices of nonmonetary determination and the appeals or reconsideration requests filed in response to such notices, and may adopt rules prescribing the manner and procedure by which employers within the base period of a claimant become entitled to notice of nonmonetary determination.

(e) ~~(d)~~ *Determinations in labor dispute cases.*—If a ~~Whenever any~~ claim involves a labor dispute described in s. 443.101(5) ~~443.101(4)~~, the Agency for Workforce Innovation shall promptly assign the claim to a special examiner who shall make a determination on the issues involving unemployment due to the labor dispute. The special examiner shall make the determination after an investigation, as necessary. The claimant or another party entitled to notice of the determination may appeal a determination under subsection (4).

(f) ~~(e)~~ *Redeterminations.*—

1. The Agency for Workforce Innovation may reconsider a

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determination if it finds an error or if new evidence or information pertinent to the determination is discovered after a prior determination or redetermination. A redetermination may not be made more than 1 year after the last day of the benefit year unless the disqualification for making a false or fraudulent representation under s. 443.101(7) ~~443.101(6)~~ is applicable, in which case the redetermination may be made within 2 years after the false or fraudulent representation. The agency must promptly give notice of redetermination to the claimant and to any employers entitled to notice in the manner prescribed in this section for the notice of an initial determination.

2. If the amount of benefits is increased by the redetermination, an appeal of the redetermination based solely on the increase may be filed as provided in subsection (4). If the amount of benefits is decreased by the redetermination, the redetermination may be appealed by the claimant if a subsequent claim for benefits is affected in amount or duration by the redetermination. If the final decision on the determination or redetermination to be reconsidered was made by an appeals referee, the commission, or a court, the Agency for Workforce Innovation may apply for a revised decision from the body or court that made the final decision.

3. If an appeal of an original determination is pending when a redetermination is issued, the appeal, unless withdrawn, is treated as an appeal from the redetermination.

====== D I R E C T O R Y C L A U S E A M E N D M E N T ======
And the directory clause is amended as follows:

Delete line 149


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and insert:
(d), (f), and (g) of subsection (1) of section 443.091, Florida

Delete line 876
and insert:
subsection (2), subsection (3), and

========== T I T L E A M E N D M E N T ==========
And the title is amended as follows:
Delete lines 6 - 15
and insert:
understanding; amending s. 443.036, F.S.; revising the definitions for "available for work," "base period," "earned income," "misconduct," and "unemployment"; adding definitions for "alternative base period" and "initial skills review"; amending s. 443.091, F.S.; revising requirements for making continued claims for benefits; requiring that an individual claiming benefits report certain information and participate in an initial skills review; providing an exception; specifying criteria for determining an applicant's availability for work; providing for an alternative base period under certain circumstances; amending s.

After line 47
insert:
requiring an employer to provide wage information to support an individual's eligibility for benefits; authorizing the Agency for Workforce Innovation to


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accept an affidavit from the claimant to support eligibility for benefits under certain circumstances;

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 228
INTRODUCER:	Senator Siplin
SUBJECT:	Code of Student Conduct
DATE:	March 8, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Matthews	ED	**Favorable**
2.	O'Connor	Maclure	JU	**Favorable**
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill requires student conduct codes to include provisions on student dress and style of wearing clothing. District school boards are specifically required to adopt a dress code policy that prohibits students from wearing clothing in a revealing manner or in a way that is disruptive to learning. This bill provides sanctions for violators, which range from a verbal warning and parental notice to in-school suspension.

To maintain eligibility to participate in interscholastic extracurricular activities, students are required to comply with the district school board student conduct code, including the section on dress code policy.

This bill substantially amends sections 1006.07 and 1006.15, and reenacts section 1002.23(7), Florida Statutes.

II. Present Situation:

As part of their duties to maintain student discipline and preserve school safety, district school boards are required to adopt student conduct codes for public schools, from elementary through high school, and distribute the codes annually to teachers, school employees, students and parents.[1] Certain material is required for inclusion in each code, such as:

- Consistent policies and specific grounds for disciplinary action, including school suspensions, expulsions, and other responses to certain substance-related offenses;

[1] Section 1006.07(2), F.S.

- The process to be followed for discipline, including corporal punishment;
- Student rights and responsibilities; and
- Notice of various infractions and penalties.[2]

In accordance with the supplemental powers and duties of district school boards, permissive authority is provided to school boards to require students to wear uniforms, or adopt other dress-related requirements, if considered necessary to protect the safety or welfare of the student body or school employees.[3]

Section 1006.15, F.S., addresses student criteria for participation in extracurricular activities. To maintain participation eligibility, this provision requires certain factors to be met, such as a minimum grade point average, execution of an academic performance contract, and compliance with certain conduct requirements.[4]

The exposure of underwear, also known as "sagging," allegedly originated in jails, where inmates are denied belts for security reasons.[5] There appear to be a growing number of cities that have banned sagging.[6] Several Florida school districts have, in fact, adopted policies that establish specific standards for dress and grooming for public school students.[7]

An example of a dress code policy in a student conduct code is that adopted by the School Board of Orange County, which provides, in part:

> Clothes shall be worn as they are designed – suspenders over the shoulders, pants secured at the waist, belts buckled, no underwear as outerwear, no underwear exposed….Clothing with holes, tears, or inappropriate patches will not be allowed if considered obscene….Bare midriffs and bare sides should not show even when arms are extended above the head.

A violation of the code based on dress is considered to be a Level I, or least serious, offense. Penalties range from parental contact and a verbal reprimand to a withdrawal of privileges and detention. Repeat offenders are reclassified to Level II, which authorizes in-school suspension.[8]

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[2] *Id.*
[3] Section 1001.43(1)(b), F.S.
[4] Section 1006.15(3)(a), F.S.
[5] http://www.buzzle.com/articles/sagging-pants-history.html.
[6] Opa-Locka, Florida, enacted a sagging ban ordinance on October 24, 2007, in schools, parks, and city-owned property. *See* http://www.floridatrend.com/print_article.asp?aID=48655. The Atlanta Board of Education has banned sagging in all of the system's public schools. *See* http://blogs.bet.com/news/newsyoushouldknow/atlanta-cracks-down-on-low-riding-jeans/.
[7] Duval County Public Schools' dress code includes a prohibition on the exposure of underwear. *See* http://www.duvalschools.org/static/students/codeofconduct/codeofappearance.asp. Santa Rosa County School District's code of student conduct prohibits the wearing of clothing that reveals undergarments. *See* http://www.santarosa.k12.fl.us/files/csc.pdf.
[8] The Orange County School District code is available online at: https://www.ocps.net/Documents/CodeofStudentConductandParentGuide_2010-11.pdf.

III. Effect of Proposed Changes:

This bill requires district school boards to include a student dress policy in student conduct codes. It also requires language to be included in the policy which prohibits students from wearing clothing to school during the regular school day that indecently or in a vulgar manner exposes underwear or body parts or that is disruptive to an orderly learning environment.

Schools will then be required to monitor this component of the policy and impose sanctions for students who violate the policy. The extent of involvement required by the school is contingent on how many times a student has committed an offense as follows:

- For first offenders, the school is required to give the student a verbal warning, and the principal must call the student's parent or guardian;
- For second offenders, the student is ineligible to participate in extracurricular activities for up to 5 days, and the principal must meet with the parent or guardian;
- For third or subsequent offenders, the extracurricular activity exclusion is extended to up to 30 days; the school must place the student in in-school suspension for up to 3 days; and the principal must both call and send written notice to a parent or guardian.

In addition, it is expected that the school will incur related recordkeeping duties, and provide some level of training to school personnel regarding observation of student dress and the process for enforcement.

Finally, a section of the Family and School Partnership for Student Achievement Act is republished to indicate that its reference to the student code of conduct refers to the updated code as amended by the bill.

This bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

First Amendment

The bill may potentially implicate First Amendment concerns. Courts have long held that students do not lose their constitutional right to freedom of speech or expression at the schoolhouse gate.[9] However, courts have also repeatedly affirmed the authority of the states and school districts to prescribe and control conduct in schools.[10] Mere regulation of clothing or dress is not constitutionally problematic. Rather, the court will review the restriction in the context of whether the policy interferes with a constitutionally protected political viewpoint. Therefore, at different points in history, the court has upheld on First Amendment grounds the ability of individuals to wear armbands to school to protest the Vietnam War,[11] armbands signifying allegiance to a Nazi association,[12] and hoods and robes indicating membership in the Ku Klux Klan.[13] Likewise, courts have routinely denied the extension of First Amendment protections to instances in which a policy restricts dress that cannot be shown to be political speech.

Specifically on point is a case that involved a school prohibition on the wearing of pants in a manner that is known as "sagging." In spite of the student's assertions that sagging pants constituted the style of "hip hop," and the greater African-American group identity, the court held that this did not rise to the level of speech, thereby precipitating analysis of political content.[14] In fact, the court noted that the wearing of a certain clothing style is generally not considered to be expressive conduct.[15]

Also, since *Tinker v. Des Moines Independent Community School District*, even in the presence of political expression, some courts have recognized as valid a school's restriction on speech in furtherance of education interests. In so doing, the court has reiterated that First Amendment rights are not automatically coextensive with the rights of adults in other environments, and that even if the government could not censor the same speech outside of the school setting, "A school need not tolerate student speech that is inconsistent with its basic educational mission."[16] In another case, the U.S. Supreme Court upheld a school's disciplinary action of sanctioning speech that contained language considered vulgar and obscene, based on a rule that prohibited "conduct that substantially interfered with the educational process, including the use of obscene, profane language or gestures."[17]

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[9] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).
[10] *Id.* at 507.
[11] *Tinker*, 393 U.S. 503.
[12] *Collin v. Smith*, 578 F.2d 1197, 1201 (7th Cir. 1978).
[13] *Hernandez v. Superintendent, Fredericksburg-Rappahannock Joint Security Center*, 800 F.Supp. 1344 (U.S.D.C. VA. 1992).
[14] *Bivens By and Through Green v. Albuquerque Public Schools*, 899 F.Supp. 556, 558, 561 (U.S.D.C. N.M. 1995). *See also Blau v. Fort Thomas Public School District*, 401 F.3d 381 (6th Cir. 2005) (upholding dress code restriction on baggy or tight clothing, among other things); *Brandt v. Board of Educ. of City of Chicago*, 480 F.3d 460 (7th Cir. 2007) (upholding dress code restriction on "gifted" T-shirt); *Canady v. Bossier Parish School Bd.*, 240 F.3d 437 (5th Cir. 2001) (upholding mandatory uniform policy); *Bar-Navon v. School Board of Brevard County, Florida*, 2007 WL 3284322, (M.D. Fla. 2007) (granting motion for summary judgment for the school district on dress code policy that provides that pierced jewelry is limited to the ear).
[15] *Bivens*, *supra* note 14, at 560.
[16] *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988).
[17] *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).

Therefore, it appears that precedential support exists for the prohibition of certain clothing, or the manner in which clothing is worn, based on an assertion that it is otherwise disruptive to learning. Still, without knowing the specific language that district school boards would draft should this bill become law, it is unclear whether a potential challenge could result on the premise that the actual provision would be unconstitutionally vague or overbroad.[18]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

District school boards may incur a slight cost from adding a student dress policy to existing codes on student conduct. Schools may incur an indeterminate impact in monitoring and enforcing the student dress component of the conduct code.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[18] Laws that regulate speech can be subject to a facial constitutional challenge if they are vague or overbroad. A law is unconstitutionally vague if a person "of common intelligence must necessarily guess at its meaning." *Connolly v. General Construction Co.*, 269 U.S. 385, 391 (1926). A law is overbroad if it substantially threatens protected speech. *See Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987).

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 594
INTRODUCER:	Senator Hays
SUBJECT:	Statutes of Limitations
DATE:	March 8, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Boland	Maclure	JU	**Pre-meeting**
2.			GO	
3.			CA	
4.				
5.				
6.				

I. Summary:

A statute of limitations is a law that bars legal claims after a specified period of time, usually based on when the injury occurred or was discovered. Currently, claims against the state or its subdivisions for a negligent or wrongful act are subject to a 4-year statute of limitations. However, there is an exception for medical malpractice claims against the state or its subdivisions, which are subject to a 2-year limitations period. The bill adds "wrongful death" to the list of exceptions governed by the 2-year statute of limitations. Thus, the bill reduces the statute of limitations for wrongful death actions against the state from 4 years to 2 years.

This bill substantially amends s. 768.28, Florida Statutes.

II. Present Situation:

Wrongful Death Actions

A wrongful death action is a lawsuit brought on behalf of a decedent's survivors for damages resulting from a tortious injury that caused the decedent's death.[1] The "Florida Wrongful Death Act" is codified in ss. 768.16-768.26, F.S. The Florida Wrongful Death Act provides that when the death of a person is caused by the wrongful act, negligence, default, or breach of contract of any person, the person who would have been liable for injury, if death had not ensued, is still liable for the damages resulting from the tortious conduct.[2] Furthermore, s. 768.20, F.S., provides that the personal representative of the decedent shall bring the wrongful death action

[1] Black's Law Dictionary (9th ed. 2009).
[2] Section 768.19, F.S.

and seek recovery on behalf of the survivors and the decedent's estate. The following damages are recoverable under the Florida Wrongful Death Act:

- Payer of Medical and funeral expenses may recover those expenses;
- Surviving spouse, minor children (defined as under 25 years of age[3]), and all children if there is no surviving spouse, hereafter "survivors", may recover lost value of support and services from date of injury until resulting death;
- Survivors may recover lost value of future support and services;
- Survivors may recover for loss of companionship and mental pain and suffering;
- Parents of deceased minors may recover for mental pain and suffering from the date of injury; and
- Decedent's estate may recover lost earnings from date of injury to the date of death.[4]

Statutes of Limitations

A statute of limitations is a law that bars legal claims after a specified period of time, usually based on when the injury occurred or was discovered.[5] These laws are designed to create equity and have a conclusive effect by preventing surprises and disallowing claims that have been allowed to slumber until evidence, memories, and availability of witnesses have eroded.[6] The theory behind a statute of limitations is that, even if one has a just claim, it is unjust not to put the adversary on notice that he/she must defend that claim within the period of limitation.[7]

Section 786.28, F.S., provides for tort actions against the state and its subdivisions. Section 768.28(14), F.S., creates special limitation periods when the state or one of its subdivisions is the defendant, notably:

> Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues; except that an action for contribution must be commenced within the limitations provided in s. 768.31(4),[8] and an action for damages arising from medical malpractice must be commenced within the limitations for such an action in s. 95.11(4).

Section 95.11, F.S., sets forth the time limitations for commencing civil actions in Florida. Specifically, s. 95.11(4)(d), F.S., provides that an action for wrongful death must be commenced within 2 years of the death from which the cause of action accrues.

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[3] Section 768.18, F.S.
[4] Section 768.21, F.S.
[5] Black's Law Dictionary (9th ed. 2009).
[6] *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944).
[7] *Id*. at 349.
[8] Section 768.31 (4), F.S., provides that where there is a judgment for wrongful death against a tortfeasor seeking contribution, any separate action by her or him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.

In *Beard v. Hambrick*, 396 So. 2d 708 (Fla. 1981), the Florida Supreme Court held that the 4-year statute of limitations provided in s. 768.28, F.S., is applicable to political subdivisions of the state rather than the 2-year statute of limitations for wrongful death actions provided in s. 95.11(4), F.S. The Court based its holding on a determination that a sheriff's office was an integral part of a "county" as defined in the Florida Constitution and therefore fell within the definition of a "political subdivision" of the state.[9] The Court found that the Legislature intended there to be one limitations period for all actions brought under s. 768.28, F.S.[10] Therefore, there is currently a 4-year statute of limitations for filing a wrongful death action against the state and its political subdivisions, and there is a 2-year statute of limitations for filing a wrongful death action against anyone other than the state and its political subdivisions.

III. Effect of Proposed Changes:

This bill shortens the statute of limitations for wrongful death actions against the state from 4 years to 2 years. Whereas the Court in *Beard v. Hambrick* held that the 4-year statute of limitations was applicable to wrongful death actions against the state and its subdivisions, this bill would legislatively override that decision and offer only the 2-year statute of limitations, provided for in s. 95.11(4), F.S., in which to file a wrongful death action against the state and its subdivisions.[11] Potentially, shortening the statute of limitations will bar some claims against the state based on the fact that claims filed after the 2-year limitation period will be untimely and dismissed on those grounds.

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill does not specify whether the newly created 2-year statute of limitations will apply only to claims that accrue on or after the effective date, or whether it will apply to claims which have already accrued. Generally, the court will construe a statute to be prospective in nature unless the Legislature specifically commands its retroactive

[9] *Hambrick*, 396 So. 2d at 711-12.
[10] *Id*. at 712.
[11] *Id*.

application.[12] That being said, this bill does have the potential to be applied to causes of action that have already accrued but are not yet filed. In this way, the bill would not be applied to currently pending claims; however, it might be applied to causes of action that have already accrued but are not yet pending (i.e., the death has occurred but no action has been filed).

Generally, only procedural or remedial statutes may be applied retroactively, and if the Legislature is silent on the issue of retroactivity, there is a presumption against the retroactive application of a law that affects substantive rights.[13] Substantive laws are those that impose new obligations or duties, or impair or destroy existing rights; they are laws that exist for their own sake and not in regard to another law (i.e., a law creating a crime, but not a law establishing the methods of punishment of a crime).[14] In order to be a constitutional retroactive application of law, the bill must not impair vested rights, create new obligations, or impose new penalties.[15] If the bill were applied to causes of action which have already accrued, then the bill might raise some constitutional concerns about retroactively impairing an individual's existing right. For example, under current law, if the death occurred 3 years ago, the estate would have a year remaining in which to file a lawsuit. If the bill were applied retroactively, it would close off the period for filing the lawsuit. In other scenarios, retroactive application might significantly reduce a prospective plaintiff's time to prepare for the filing of a lawsuit. To the extent that affecting plaintiffs in this manner constitutes an impairment of an existing or vested right, the bill may raise constitutional concerns, and a court may declare that it can only be applied prospectively.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

An estate will have a shorter period of time in which to commence a lawsuit on behalf of the survivors of a person whose death is caused by the wrongful act of the state or one of its subdivisions.

C. Government Sector Impact:

To the extent that a shorter period of time in which to institute litigation against the state or its subdivisions results in fewer wrongful death lawsuits being filed, the state and its subdivisions may potentially benefit fiscally from having fewer judgments entered against them.

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[12] Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation*, 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).
[13] See *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 425 (Fla. 1994).
[14] See *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).
[15] *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/09/2011	.	
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The Committee on Judiciary (Simmons) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Paragraphs (a) and (d) of subsection (6) and subsection (14) of section 768.28, Florida Statutes, are amended to read:

768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs.—

(6)(a) An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the

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claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality or the Florida Space Authority, presents such claim in writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial Services or the appropriate agency denies the claim in writing; except that, if:

1. Such claim is for contribution pursuant to s. 768.31, it must be so presented within 6 months after the judgment against the tortfeasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such judgment, within 6 months after the tortfeasor seeking contribution has either discharged the common liability by payment or agreed, while the action is pending against her or him, to discharge the common liability; or

2. Such action is for wrongful death, the claimant must present the claim in writing to the Department of Financial Services within 2 years after the claim accrues.

(d) For purposes of this section, complete, accurate, and timely compliance with the requirements of paragraph (c) shall occur prior to settlement payment, close of discovery or commencement of trial, whichever is sooner; provided the ability to plead setoff is not precluded by the delay. This setoff shall apply only against that part of the settlement or judgment payable to the claimant, minus claimant’s reasonable attorney’s fees and costs. Incomplete or inaccurate disclosure of unpaid adjudicated claims due the state, its agency, officer, or subdivision, may be excused by the court upon a showing by the preponderance of the evidence of the claimant’s lack of

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knowledge of an adjudicated claim and reasonable inquiry by, or on behalf of, the claimant to obtain the information from public records. Unless the appropriate agency had actual notice of the information required to be disclosed by paragraph (c) in time to assert a setoff, an unexcused failure to disclose shall, upon hearing and order of court, cause the claimant to be liable for double the original undisclosed judgment and, upon further motion, the court shall enter judgment for the agency in that amount. Except as provided otherwise in this subsection, the failure of the Department of Financial Services or the appropriate agency to make final disposition of a claim within 6 months after it is filed shall be deemed a final denial of the claim for purposes of this section. For purposes of this subsection, in medical malpractice actions and in wrongful death actions, the failure of the Department of Financial Services or the appropriate agency to make final disposition of a claim within 90 days after it is filed shall be deemed a final denial of the claim. The statute of limitations for medical malpractice actions and wrongful death actions is tolled for the period of time taken by the Department of Financial Services or the appropriate agency to deny the claim. The provisions of this subsection do not apply to such claims as may be asserted by counterclaim pursuant to s. 768.14.

(14) Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues; except that an action for contribution must be

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commenced within the limitations provided in s. 768.31(4), and an action for damages arising from medical malpractice or wrongful death must be commenced within the limitations for such actions ~~an action~~ in s. 95.11(4).

Section 2. This act shall take effect July 1, 2011, and applies to causes of action accruing on or after that date.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to sovereign immunity; amending s. 768.28, F.S.; requiring that a claim in a wrongful death case be presented to the Department of Financial Services within 2 years after the claim accrues; providing that failure of the Department of Financial Services or the appropriate agency to make final disposition of a claim for wrongful death within 90 days after it is filed is deemed to be a final denial of the claim; tolling the statute of limitations for the period of time taken by the Department of Financial Services or other agency to deny a medical malpractice or wrongful death claim; providing that actions for wrongful death against the state or one of its agencies or subdivisions must be brought within the period applicable to actions brought against other defendants; providing for the application of the act to causes of action accruing on or after the effective

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date; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 822
INTRODUCER:	Senator Bogdanoff
SUBJECT:	Expert Testimony
DATE:	March 8, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	**Pre-meeting**
2.			BC	
3.				
4.				
5.				
6.				

I. Summary:

The bill revises the standard for Florida courts to admit expert witness testimony so that it is in conformity with Federal Rule of Evidence 702 and the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The bill provides additional criteria for a court to consider in determining whether an expert witness may testify in the form of an opinion or otherwise in a case:

- The testimony is based on sufficient facts or data;
- The testimony is the product of reliable principles and methods; and
- The witness has applied the principles and methods reliably to the facts of the case.

The bill requires Florida courts to interpret and apply requirements for the admissibility of expert witness testimony and the determination of the basis of an expert's opinion, in accordance with *Daubert* and subsequent U.S. Supreme Court decisions applying *Daubert*.[1] Currently, Florida courts employ the standard articulated in *Frye v. United States*, 293 F. 1010 (D.C. Cir. 1923), which requires the party who wants to introduce the expert opinion testimony into evidence to show that the methodology or principle has sufficient reliability. Under the bill, *Frye* and subsequent Florida decisions applying or implementing *Frye* would no longer apply to a court's determination of the admissibility of expert witness testimony in the form of opinion and a court's determination of the basis of the expert's opinion.

The bill provides an effective date of July 1, 2011.

[1] *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); and *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).

This bill amends section 90.702, Florida Statutes.

II. Present Situation:

Expert testimony has been used to assist the trier of fact in both civil and criminal trials for a wide range of subjects, including polygraph examination, battered woman syndrome, child abuse cases, and serum blood alcohol. The Florida Rules of Civil Procedure define "expert witness" as a person duly and regularly engaged in the practice of a profession who holds a professional degree from a university or college and has had special professional training and experience, or one possessed of special knowledge or skill about the subject upon which called to testify.[2] Courts use expert witness testimony when scientific, technical, or other specialized knowledge may assist the trier of fact in understanding evidence or determining facts in issue during litigation. The Florida Evidence Code provides that the facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before trial.[3] If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

Frye Standard

To admit scientific testimony into evidence, Florida courts, use the standard governing the admissibility of scientific expert testimony imposed in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).[4] If the subject matter involves new or novel scientific evidence, the *Frye* standard requires the party who wants to introduce the expert opinion into evidence to show that the methodology or principle has sufficient reliability. In *Frye*, the court held that the "principle or discovery" must be sufficiently established to "have gained general acceptance in the particular field in which it belongs."[5]

The Florida Supreme Court imposes four steps in its articulation of the *Frye* test:

1. The trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue.
2. The trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs."
3. The trial judge must determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue.
4. The judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.[6]

[2] Fla. R. Civ. P. 1.390(a).
[3] Section 90.704, F.S.
[4] *Stokes v. State*, 548 So. 2d 188 (Fla. 1989).
[5] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).
[6] *Ramirez v. State*, 651 So. 2d 1164, 1166-67 (Fla. 1995).

The Florida Supreme Court noted that, under *Frye*, the court's inquiry focuses only on the general acceptance of the scientific principles and methodologies upon which an expert relies to give his or her opinion.[7] The *Frye* test is satisfied through the court's finding of proof of general acceptance of the basis of an expert's opinion.[8] Once the basis or foundation is established for an expert's opinion, the finder of fact may then assess and weigh the opinion for its value.[9] Florida courts continue to apply the *Frye* standard for determining the admissibility of scientific evidence.

The *Frye* test is not applicable to all expert opinion proffered for admissibility into evidence. If the expert opinion is based solely on the expert's experience and training, and the opinion does not rely on something that constitutes new or novel scientific tests or procedures, then it may be admissible without meeting the *Frye* standard.[10] By example, Florida courts admit medical expert testimony concerning medical causation when based solely on the expert's training and experience.[11] One court in determining the admissibility of medical expert testimony noted that *Frye* was not applicable to medical testimony (pure opinion) because the expert relied on his analysis of medical records and differential diagnosis rather than a study, test, procedure, or methodology that constituted new or novel scientific evidence.[12]

Florida Rules of Evidence

The Florida Evidence Code is codified in chapter 90, F.S. Section 90.102, specifies that the chapter replaces and supersedes existing statutory or common law in conflict with its provisions.[13] The Florida Supreme Court regular adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. The Florida Evidence Code requires an expert to demonstrate knowledge, skill, experience, training, or education in the subject matter to qualify as an expert.[14] In a concurring opinion, one justice has argued that the Florida Supreme Court has "never explained how *Frye* has survived the adoption of the rules of evidence."[15] Justice Anstead also noted that the Florida Supreme Court has continued to apply *Frye* in determining the admissibility of scientific expert opinion testimony after the adoption of the Florida Rules of Evidence, but has done so without any mention that the rules do not mention *Frye* or the test set out in *Frye*.[16]

***Daubert* Standard**

The *Frye* standard was used in federal courts until 1993 when the U.S. Supreme Court issued its opinion in the case of *Daubert.*[17] The United States Supreme Court held that Federal Rule of

[7] *Marsh v. Valyou*, 977 So. 2d 543, 548-49 (Fla. 2007).
[8] *Id.*
[9] *Id.*
[10] *Marsh*, 977 So. 2d at 548. *See also* Charles W. Ehrhardt, *Florida Evidence* s. 702.3 (2004 edition).
[11] *See, e.g., Cordoba v. Rodriguez*, 939 So. 2d 319, 322 (Fla. 4th DCA 2006); *Fla. Power & Light Co. v. Tursi*, 729 So. 2d 995, 996 (Fla. 4th DCA 1999).
[12] *Gelsthorpe v. Weinstein*, 897 So. 2d 504, 510-11 (Fla. 2d DCA 2005).
[13] Section 90.102, F.S.
[14] Section 90.702, F.S.
[15] Justice Anstead concurring in *Marsh* 977 So. 2d at 551.
[16] *Id.*
[17] *Daubert v.Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Evidence 702 had superseded the *Frye* test, and it announced a new standard for determining the admissibility of novel scientific evidence.[18] Under the *Daubert* test, when there is a proffer of expert testimony, the judge as a gatekeeper must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[19] The Court announced other factors that a court may consider as part of its assessment under the *Daubert* test for the admissibility of expert scientific testimony:

- Whether the scientific methodology is susceptible to testing or has been tested;
- Whether the theory or technique has been subjected to peer review and publication;
- Whether in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error; and
- The existence and maintenance of standards controlling the technique's operation.

Federal Rule of Evidence 702 was amended in 2000 to reflect *Daubert* and other decisions applying *Daubert*.[20] In *General Electric Co. v. Joiner*, the U.S. Supreme Court held that abuse of discretion is the appropriate standard of review for an appellate court to apply when reviewing a trial court's decision to admit or exclude evidence under *Daubert*.[21] In *Kumho Tire Co. v. Carmichael*, the Court held that a trial judge is not bound by the specific factors outlined in *Daubert*, but depending on the circumstances of the particular case at issue, the judge may consider other factors in his or her assessment under *Daubert*.[22] Additionally, the Court in *Khumo Tire Co.* held that the trial judge's obligation to be a gatekeeper is not limited to scientific testimony but extends to all expert testimony.[23]

The *Weisgram v.Marley Co.* case, a part of the *Daubert* progeny, was a wrongful death action against a manufacturer of heaters in which the plaintiff introduced expert testimony that the alleged heater defect caused a house fire.[24] The Court held that a federal appellate court may direct the entry of judgment as a matter of law when the court determines that evidence was erroneously admitted at trial and the remaining evidence which was properly admitted is insufficient to support the jury verdict.[25] The plaintiffs obtained a jury verdict based on the expert testimony that the heater was defective and that the heater's defect caused the fire.[26] The Supreme Court affirmed the Court of Appeals' reversal of the jury verdict, finding that the expert testimony offered by the plaintiff was speculation under Federal Rule of Evidence 702 as explicated in *Daubert* regarding the defectiveness of the heater.[27] The Court found the plaintiff's fears unconvincing that "allowing [federal] courts of appeals to direct the entry of judgment for defendants will punish plaintiffs who could have shored up their cases by other means had they

[18] *Id.*
[19] *Id.* at 592-93.
[20] Fed. R. Evid. 702, Advisory Committee Notes for 2000 Amendments.
[21] *General Electric Co. v. Joiner*, 522 U.S. 136, 139 (1997).
[22] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-52 (1999).
[23] *Id.*
[24] *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).
[25] *Id.* at 445-46.
[26] *Id.*
[27] *Id.* at 445-47.

known their expert testimony would be found inadmissible."[28] The Court stated that *Daubert* put parties on notice regarding the exacting standards of reliability demanded of expert testimony.[29]

Other state courts have used the *Frye*, *Daubert*, and other tests in determining the admissibility of expert testimony regarding scientific, technical, or other specialized knowledge.[30] Advocacy groups and scholars differ on how many states still maintain the *Frye* standard and the number which have moved to the *Daubert* or a similar standard for determining the admissibility of scientific and evidence.[31]

III. Effect of Proposed Changes:

The bill revises the standard for Florida courts to admit expert witness testimony so that it is in conformity with Federal Rule of Evidence 702 and the standard articulated in *Daubert*. The requirements for a witness qualified as an expert by knowledge, skill, experience, training, or education to testify in the form of an opinion are revised to impose additional criteria for the admissibility of the testimony. The criteria include the following three-part test for a court's consideration to determine whether an expert witness may testify in the form of an opinion or otherwise in a case:

- The testimony is based on sufficient facts or data;
- The testimony is the product of reliable principles and methods; and
- The witness has applied the principles and methods reliably to the facts of the case.

The bill requires Florida courts to interpret and apply requirements for the admissibility of expert witness testimony and the determination of the basis of an expert's opinion, in accordance with *Daubert* and subsequent U.S. Supreme Court decisions applying *Daubert*.[32] *Frye* and subsequent Florida decisions applying or implementing *Frye* would no longer apply to a court's determination of the admissibility of expert witness testimony in the form of opinion and a court's determination of the basis of the expert's opinion.

The bill provides an effective date of July 1, 2011.

Other Potential Implications:

There is a balance between enactments of the Legislature and the Florida Supreme Court on matters relating to evidence. The Legislature has enacted and continues to revise ch. 90, F.S., and the Florida Supreme Court tends to adopt these changes as rules. The Florida Supreme Court regularly adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. If the Florida Supreme Court views the changes

[28] *Id.* at 455-56.
[29] *Id.*
[30] Comm. on Judiciary, The Florida Senate, *Analysis of Law Relating to Admissibility of Expert Testimony and Scientific Evidence*, 5 (Issue Brief 2009-331) (Oct. 2008).
[31] *Id.*
[32] *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); and *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).

in this bill as an infringement upon the Court's authority over practice and procedure, it may refuse to adopt the changes in the bill as a rule.[33]

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

[33] *See, e.g., In re Florida Evidence Code*, 782 So. 2d 339 (Fla. 2000) (Florida Supreme Court adopting Evidence Code to the extent it is procedural and rejecting hearsay exception as a rule of court) and *compare with In re Florida Evidence Code*, 372 So.2d 1369 (Fla. 1979) (Florida Supreme Court adopting Florida Evidence Code to the extent it is procedural), *clarified, In re Florida Evidence Code*, 376 So. 2d 1161 (Fla. 1979).

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/09/2011	.	
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The Committee on Judiciary (Bogdanoff) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Section 90.702, Florida Statutes, is amended to read:

90.702 Testimony by experts.—

(1) If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

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education may testify about it in the form of an opinion, or otherwise, if:

(a) The testimony is based upon sufficient facts or data;

(b) The testimony is the product of reliable principles and methods; and

(c) The witness has applied the principles and methods reliably to the facts of the case~~; however, the opinion is admissible only if it can be applied to evidence at trial~~.

(2) The courts of this state shall interpret and apply the requirements of subsection (1) and s. 90.704 in accordance with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and subsequent Florida decisions applying or implementing *Frye* no longer apply to subsection (1) or s. 90.704.

Section 2. Section 90.704, Florida Statutes, is amended to read:

90.704 Basis of opinion testimony by experts.—The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible in evidence may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that the probative value of the facts or data in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect

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of the facts or data.

Section 3. This act shall take effect July 1, 2011.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to expert testimony; amending s. 90.702, F.S.; providing that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion as to the facts at issue in a case under certain circumstances; requiring the courts of this state to interpret and apply the principles of expert testimony in conformity with specified United States Supreme Court decisions; amending s. 90.704, F.S.; providing that facts or data that are otherwise inadmissible in evidence may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that the probative value of the facts or data in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect of the facts or data; providing an effective date.