

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 Committee on Banking and Insurance

BILL: SB 444

INTRODUCER: Senator Galvano

SUBJECT: Workers' Compensation

DATE: January 11, 2014 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	Pre-meeting
2.			AGG	
3.			AP	

I. Summary:

- SB 444 amends provisions relating to the administration and enforcement of Florida's Workers' Compensation Law by the Department of Financial Services (DFS). Presently, if an employer fails to comply with coverage requirements, the DFS is required to issue a stop-work order (SWO) within 72 hours of determining noncompliance. The SWO requires the employer to cease all business operations immediately. Additionally, an employer is assessed a penalty equal to 1.5 times the amount the employer would have paid in workers' compensation premiums for all periods of noncompliance during the preceding 3-year period or \$1,000, whichever is greater. The SWO remains in effect until the employer secures appropriate coverage and the DFS issues (1) an order releasing the SWO (for employers that have paid the assessed penalty); or (2) an order of conditional release (for employers that have agreed to pay the penalty in installments pursuant to a payment agreement schedule with the DFS). The bill amends provisions related to SWOs and associated penalties as follows:
- Extends the number of days for an employer to provide requested records to the DFS from 5 to 10 days or be subject to an SWO.
- Authorizes the DFS to issue an order of conditional release from an SWO to an employer that has secured appropriate coverage if the employer pays \$1,000 as a down payment on the assessed penalty and agrees to pay the remainder of the penalty in periodic installments pursuant to a payment agreement schedule with the DFS or to pay the remaining penalty in full. The bill authorizes an immediate reinstatement of the SWO if the employer does not pay the full penalty or enters into a payment agreement within 28 days after service of the SWO upon the employer. The bill repeals a required employer reporting requirement for a probationary period.
- Credits the initial payment of premium made by the employer to secure coverage against the assessed penalty for not having coverage for an employer that has not previously been issued a SWO. The bill provides for minimum assessment of a \$1,000 penalty if the calculated

penalty after the credit is applied is less than \$1,000. The bill also specifies documentation that an employer must submit to the DFS.

- Revises the penalty for failing to have required coverage. The bill reduces the look-back period for failure to comply with coverage requirements from 3 to 2 years and increases the penalty multiplier from 1.5 to 2 times the amount of unpaid premiums.

The bill also codifies a recent court decision regarding the calculation of workers' compensation indemnity benefits to allow the payment of such benefits at either 66.67 percent or the current 66 2/3 percent of the employee's average weekly wage. This change would not have a fiscal impact since it reflects current procedures used by carriers. The remaining provisions of the bill are expected to have a negligible fiscal impact.

II. Present Situation:

Coverage Requirements

The Division of Workers' Compensation within the Department of Financial Services is responsible for administering ch. 440, F.S., including the enforcement of coverage requirements. Whether an employer is required to have workers' compensation insurance depends upon the employer's industry and the number of employees. Employers may secure coverage by purchasing a workers' compensation insurance policy or qualifying as a self-insurer.¹

An employer in the non-construction industry that employs 4 or more part of full time employees must secure insurance.² An employer engaged in the construction industry must secure workers' compensation insurance if it employs one or more part or full time employees.³ No more than three officers of a corporation or members of a limited liability company, who are engaged in the construction industry, may elect to be exempt from this requirement, if certain conditions are met.⁴ Corporate officers and members of a non-construction LLC can elect to be exempt from workers' compensation coverage requirements.⁵

An employer may secure the workers' compensation coverage for his or her employees by entering into an employee leasing arrangement. In a traditional employee leasing arrangement, an employee leasing company will enter into an arrangement with an employer under which all or most of the client's workforce is employed by the leasing company and leased to the client company.⁶ The employer must notify the employee leasing company of the names of covered employees.

Enforcement of Coverage Requirements

If an employer fails to comply with workers' compensation coverage requirements, the DFS must issue a stop-work order (SWO) within 72 hours of determining noncompliance.⁷ The SWO,

¹ Section 440.38, F.S.

² Section 440.02(17)(b)2, F.S.

³ *Id.*

⁴ Section 440.05, F.S.

⁵ *Id.*

⁶ The Board of Employee Leasing Companies within the Department of Business and Professional Regulation license and regulate employee leasing companies pursuant to Part XI of chapter 468, F.S. Temporary help arrangements are excluded from the definition of employee leasing. (s. 468.520, F.S.)

⁷ Section 440.107, F.S.

requires the employer to cease all business operations. The SWO, remains in effect until the employer secures appropriate coverage and the DFS issues an order releasing the SWO (for employers that have paid the assessed penalty); or an order of conditional release (for employers that have agreed to pay the penalty in installments pursuant to a payment agreement schedule with the DFS). Additionally, employers are assessed a penalty equal to 1.5 times what the employer would have paid in workers' compensation premiums for all periods of non-compliance during the preceding 3-year period or \$1,000, whichever is greater. Thus, for penalty calculation purposes, the employer must provide 3 years of business records. Some employers are often unable to quickly provide all records required to calculate the penalty. The SWO remains in effect and the employer cannot conduct business until the DFS has calculated the penalty.

A SWO is issued for the following violations: failure to obtain workers' compensation insurance; materially understating or concealing payroll; materially misrepresenting or concealing employee duties to avoid paying the proper premium; materially concealing information pertinent to the calculation of an experience modification factor; and failure to produce business records within 5 days of receipt of a written request from the DFS.⁸ As a condition of release from a SWO, the DFS may require an employer to file periodic reports for up to 2 years to document the employer's continued compliance with coverage requirements.

Workers' Compensation Indemnity Benefits

Workers' compensation indemnity (monetary) benefits are payable to employees who miss at least 8 days of work due to a covered (compensable) injury. Indemnity benefits are payable retroactively from the first day of disability (to include compensation for the first seven days missed) to employees who miss more than 21 days of work due to a compensable injury.⁹ Such benefits are generally payable at 66 2/3 percent of the employee's average weekly wage (AWW), up to the maximum weekly benefit established by law.¹⁰

In a 2013 case, an employer had calculated the compensation rate for a claimant by multiplying the AWW by .66667 (or \$529.48). The Judge of Compensation Claims (JCC) calculated the compensation rate by multiplying the AWW by .6667 (or \$529.50). On appeal, the First District Court of Appeal held that the JCC erred in requiring the employer to pay more than 66 2/3 of the AWW, namely \$529.47.¹¹

III. Effect of Proposed Changes:

Enforcement of Coverage Requirements

The bill allows employers an additional 5 business days (10 days total) to produce records requested by the DFS before the issuance of a stop-work order.

The bill revises penalty for failure to comply with coverage requirements by increasing the penalty multiplier from 1.5 to 2 times the unpaid premiums and reducing the penalty period from the preceding 3 years to the prior 2 years.

⁸ *Id.*

⁹ Section 440.12(1), F.S.

¹⁰ Section 440.15, F.S.

¹¹ *Escambia County School District v. Vickery-Orso*, 109 So. 3d 1242 (Fla 1st DCA 2013).

The DFS is authorized to issue a conditional release of a SWO if the employer has obtained coverage, paid a \$1,000 down payment and agrees to either pay the remaining penalty or enter into a periodic payment agreement. The bill authorizes an immediate reinstatement of the SWO if the employer does not pay the full penalty or enters into a payment agreement within 28 days after service of the SWO upon the employer. The bill repeals a required employer reporting requirement for a probationary period.

The bill provides for a credit of the initial payment of workers' compensation insurance premium against the full amount of the penalty for employers who have not been previously issued a SWO. The employer is required to provide the DFS with documentation that the employer has secured the payment of compensation and proof of payment to the carrier. If an employer secures coverage through an employee leasing company, the bill requires the employer to provide the DFS with a written attestation by a representative from the employee leasing company that the employer has entered into an employee leasing contract, the dollar amount attributable to the initial payment of estimated workers' compensation premium for the employer, and proof of payment to the employee leasing company. The bill provides for assessment of a minimum \$1,000 penalty against an employer if the calculated penalty after the credit is applied is less than \$1,000.

Calculation of Compensation

The bill addresses the Escambia decision by authorizing employers to pay compensation at either 66 2/3 percent or 66.67 percent of the AWW. The latter calculation produces a slightly higher compensation rate for injured employees and removes the need for employers/carriers that have been paying benefits at 66.67 percent of the AWW to incur additional costs associated with modifying their payment procedures.

The bill is effective July 1, 2014.

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:

The bill allows employers 5 additional days to produce records requested by the DFS before the issuance of a SWO.

The bill revises the employer penalty for not having coverage by reducing the look-back period from the preceding 3 years to 2 years for purposes of calculating the penalty; however it increases the penalty multiplier from 1.5 to 2 times the amount an employer would have paid in premium.

If an employer has not been previously issued a SWO, the bill provides for a credit of the initial payment of premium made to secure coverage against the assessed penalty, thereby decreasing the amount of the penalty to be paid by the employer.

The codification of the 66.67 percent compensation rate reflects current carrier claims payment procedures; so, there is no impact.¹²

C. Government Sector Impact:

According to the DFS, revising the coverage non-compliance penalty will have a negligible impact on the Workers' Compensation Administration Trust Fund.¹³

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 440.107, 440.15, and 440.16.

¹² Department of Financial Services, *Senate Bill 444 Fiscal Analysis* (December 6, 2013) (on file with the Senate Banking and Insurance Committee).

¹³ *Id.*

IX. Additional Information:

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

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
