SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 770

SPONSOR: Senator Crist

SUBJECT: Workers' Compensation/Law Enforcement

DATE: April 2, 2001 REVISED: 04/03/01

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Deffenbaugh	BI	Favorable
2.	Hayes	Martin	AGG	Fav/2 amendments
3.			AP	Withdrawn: Fav/2 am.
4.				
5.				
6.				

I. Summary:

Under current Florida law, workers' compensation only covers an employee's injury if the injury arises out of and occurs within the course and scope of employment. An employee is not considered to be acting within the course and scope of employment when "going to or coming from" work, unless engaged in a special errand or mission for the employer (this is known as the "going or coming" rule).

Law enforcement officers now enjoy a limited exception to the "going or coming" rule when injured while carrying out their "primary responsibility" to prevent or detect crime or enforce the penal, criminal, traffic, or highway laws of the state, while off-duty. They are deemed by operation of s. 440.091, F.S., to have been injured within the course of employment, and therefore are covered by workers' compensation.

This bill broadens the circumstances in which law enforcement officers, correctional officers, and correctional probation officers are considered to be acting within the course and scope of employment and, accordingly, covered by workers' compensation by creating an additional statutory exception to the "going and coming" rule. The bill provides that a law enforcement officer, correctional officer, or correctional probation officer, who during the officer's assigned work schedule or while going to or coming from work, is in a marked or unmarked vehicle is deemed to be engaged in a special errand or mission for the employer, such that injuries are covered by workers' compensation, regardless if the accident is related to personal use of the vehicle.

The bill is expected to have an impact on state and local governments of an indeterminate amount.

This bill substantially amends section 440.092, Florida Statutes.

II. Present Situation:

Pursuant to chapter 440, the workers' compensation system provides indemnity and medical benefits to injured employees. In order for an employee to be entitled to workers' compensation benefits, the law requires that the injury "arise out of" and be in the course and scope of the employment.

Use of State Vehicles

Generally, in order to be eligible for coverage provided by the Division of Risk Management of the Department of Insurance, the statutes and Department of Management Services (DMS) rules regarding the proper use of state-owned vehicles have required that a state employee be within the "course and scope of employment" at the time of the accident. Rule 60B-1, F.A.C., governs the use of state vehicles and places specific limits on the use of state vehicles and does not authorize use of state vehicles for personal purposes.

According to the Division of Risk Management, the facts involving an employee's activities at the time of the accident or event are controlling in determining whether the employee was in the course of employment. For example, coverage is in effect for a driver of a state vehicle to and from work who is subject to emergency calls from his residence, assuming that no deviations from travel directly to and from work occur, and the emergency calls fall within state rule requirements for law enforcement or protection of life or property. Personal errands or other personal use of state vehicles removes a state employee from being in the course and scope of employment so that state coverage does not apply. According to the division, coverage is not in effect for a sworn law enforcement officer solely as a consequence of his being subject to responding to emergency calls. Being "on-call" does not constitute being in the course and scope of employment until actually called to an emergency.

State agencies have adopted rules and procedures governing the use of state vehicles. According to the Florida Department of Law Enforcement's (FDLE) Policy 1.4, Use of FDLE's Resources, dated February 5, 2001: "Members may not use FDLE owned or provided vehicles for unauthorized purposes and shall not permit unauthorized persons to operate or ride in such vehicles. The State of Florida and FDLE assume no liability or responsibility for injuries or property damage that occurs during the unauthorized use of vehicles in a manner other than authorized."

According to FDLE Policy 3.25, dated March 6, 2000, "Incidental use of FDLE owned, rented, or leased vehicles is permitted only when such use does not create an appreciable divergence from the most direct or practical route to an official or authorized destination. Members assigned Class C vehicles (which includes sworn law enforcement subject to call on a 24 hour basis) on travel status may use their assigned vehicle for meals and other incidental travel. However, this should be minimized and confined to the general area of the travel destination."

In the event an officer is injured during the incidental use, the FDLE Vehicle Assignment Draft Discussion Document states "…the Division of Risk Management is not bound by FDLE's

vehicle use policies or practices. The fact that FDLE allows some incidental supplementary use by reason of its departmental policy is of no consequence or effect. The issue will be whether the use at the time of the incident is within the course and scope of employment."

The FDLE Vehicle Assignment Draft Discussion Document, also states, "The DMS rules make it clear that Florida does not expect taxpayers to cover an employee's use of a state-owned car as a matter of convenience rather than as directly required by that employee's duties and responsibilities. If an FDLE agent is taking enforcement action within the course and scope of his or her duties as an FDLE agent, Risk Management will cover it. It's the personal convenience use and other uses outside of the course and scope of employment that would not be covered by Risk Management."

In the Vehicle Assignment Draft Discussion Document, the department "…recommends that any member who utilizes a state vehicle obtain supplementary automobile coverage under the members' personal automobile policy to fill in the gaps should an accident occurs that is not covered by the state." (Not within the course or scope of employment)

In regards to the use of a state vehicle for sworn off duty employment, FDLE notes that, "…though FDLE has approved the use under its policy, it is unlikely Risk Management will cover you for the use of that car in your off duty work. Even though your secondary employment may be by reason of you being a law enforcement officer, your employment is a matter of personal convenience from Risk Management's perspective. The DMS approach would be that there is no justification for Florida taxpayers to support you in your secondary employment efforts. Should you engage in official law enforcement actions as a law enforcement officer while utilizing the car, the portion of time that you have "traded your off duty hat for your FDLE agent hat" and are engaged in enforcement activity will most likely be considered to be within the scope and course of state employment and should be covered by Risk Management."

The Florida Department of Law Enforcement requires any agent who seeks to utilize a state car in his or her off duty employment to provide FDLE with proof of personal insurance coverage or a signed commitment to be solely and exclusively liable for all damages that may occur by reason of the use of the vehicle.

"Arising Out Of" the Employment

According to s. 440.02(32), F.S., an injury is deemed to arise out of employment "if work performed in the course and scope of employment is the major contributing cause of the injury." Much litigation in workers' compensation has been devoted to the issue of whether an injury arose out of and occurred in the course and scope of employment. The First District Court of Appeal stated that in order to establish that an accident arose out of, and occurred in the course and scope of, the employment, it is "sufficient for the claimant to prove that her injury occurred in the period of her employment, at a place where she would reasonably be, while fulfilling her duties." *Hillsborough County School Board v. Williams, 565 So.2d 852, 853-54 (Fla. 1st DCA 1990)*

Going and Coming Rule

According to Florida law, if an injury is suffered while going to or coming from work, the injury is not one which arises out of and in the course of employment. Section 440.092(2), F.S. However, if the employee was engaged in a "special errand or mission" for the employer while going to or coming from work, the injury is deemed to arise out of and in the course of employment. Florida courts have stated that an employee is on a special errand if the journey was a substantial part of the service performed for the employer. *D.C. Moore & Sons v. Wadkins, 568 So.2d 998 (Fla. 1st DCA 1990).* Courts have held that an employee is on special errand where the employee is instructed by the employer to perform a special errand, which grows out of and is incidental to his employment. *Bruck v. Glen Johnson, Inc., 418 So.2d 1209, 1211 (Fla. 1st DCA 1982).* A typical "special errand" exists when the employer calls the employee at home, and instructs him to deviate from his normal route into work to pick up an item needed for the purposes of employment that day. See *Spartan Food Systems & Subsidiaries v. Hopkins, 525 So.2d 987 (Fla. 1st DCA 1988)* (Employee directed to pick up drink cups on way into work).

Within the Course of Employment – Off-Duty

Section 440.091, F.S., provides that if an employee: is elected, appointed, or employed full time by a municipality, the state, or any political subdivision, is vested with authority to bear arms and make arrests, and whose primary responsibility is the prevention or detection of crime or the enforcement of penal, traffic, or criminal laws of the state; was discharging that primary responsibility within the state; and was not engaged in services for a private employer; the employee is deemed to have been acting in the course and scope of employment, regardless of whether he or she is going to or coming from work.

Courts recently have held that s. 440.091, F.S., applies to off-duty officers, rather than on-duty officers. *Klyce v. City of Largo, 765 So.2d 270 (Fla 1st DCA 2000)* An off-duty officer who is not carrying out his primary responsibilities is not acting within the course of his employment for workers' compensation purposes. *Palm Beach County Sheriff's Office v. Ginn, 570 So.2d 1059 (Fla. 1st DCA 1990)* (Although an officer is on call for duty and has police radio and other indicia of authority, these factors are not dispositive in determining whether an off-duty officer is acting within the course of his employment. The issue is whether the officer was carrying out his "primary responsibility"). In *City of Fort Lauderdale v. Abrams, 561 So.2d 1294 (Fla. 1st DCA 1990)* a forensic detective was on her way to work in her personal vehicle when she was struck from behind at a red light. Because the forensic detective was not investigating a crime or enforcing the law when she was struck from behind, the court stated that she was not carrying out her primary responsibility. As a result, the court held the injury did not arise out of or within the course and scope of her employment and were not covered by workers' compensation.

On-Duty Officer – Deviation From Employment

In *City of Lakeland v. Schiel, 687 So.2d 1323 (Fla. 1st DCA 1997),* an on-duty Special Investigation Division (SID) officer driving an unmarked vehicle was denied workers' compensation benefits when he was struck by a van while checking on his daughter who had just been in a car accident. Because it was not protocol for SID officers to investigate traffic accidents, the court held that claimant was on a "personal errand at the time of his injury and was

not acting within the course or scope of his employment or discharging the duties of a law enforcement officer."

In *Hanstein v. City of Fort Lauderdale, 569 So.2d 493 (Fla. 1st DCA 1990),* for example, a patrol officer was on his way to work in his personal vehicle when he observed a truck making an improper turn. The officer testified that he made a "conscious decision" to issue a citation for the violation, but before he could do so, his vehicle was struck by the truck. Because department policy prohibited an officer from issuing a citation for an accident in which the officer is involved, the officer could not issue a citation. The court held that although the officer did not actually take affirmative action, the officer was performing his primary responsibility because his responsibilities included enforcement of traffic laws. Id. at 494. As such, the officer's injuries were covered by workers' compensation.

In *Klyce v. City of Largo, 765 So.2d 270 (Fla 1st DCA 2000),* while an officer was driving home in his unmarked vehicle for lunch, he was involved in an automobile accident in which he sustained injuries. According to the collective bargaining agreement, officers are considered to be on duty while at lunch, and that they are paid for that time; however, they are subject to call when their lunch may be interrupted. The employer/carrier denied benefits on the grounds that the accident was not within the course and scope of employment, and the claimant was not discharging responsibilities of a law enforcement officer, pursuant to s. 440.091, F.S. The court ruled that s. 440.091, F.S., does not apply to on-duty officers and the claimant was involved in an activity that his employer specifically designated as being part of his employment; thus, no deviation of employment occurred; therefore the officer should be provided coverage.

Law Enforcement, Correctional, and Correctional Probation Officers' Duty to Act

There is no provision in Florida law which places a legal obligation on law enforcement, correctional, or correctional probation officers to take affirmative action when they are off-duty. However, inquiries by staff to several law enforcement agencies (Sheriff and Police Departments) indicate that most law enforcement agencies, through internal policy, require their officers to be "on-duty" 24 hours a day. These law enforcement officers, who have the authority to make arrests when off-duty, would have a responsibility to take reasonable affirmative action any time they witness a criminal act.

Staff inquiries also indicate that the majority of correctional officers are not sworn law enforcement officers and do not have the authority to make arrests when off duty; therefore, those correctional officers do not have the same authority as law enforcement officers when going to and coming from work. Also, staff inquiries reveal that correctional probation officers have the authority to make arrests, but this authority is limited to the offenders on probation.

III. Effect of Proposed Changes:

Section 1. Amends s. 440.092, F.S., relating to the going or coming to work provision, to provide that a law enforcement, correctional, or correctional probation officer, who, during the officer’s assigned work schedule or while going to or coming from work in a marked or unmarked official law enforcement vehicle, is considered to be engaged in a special errand or mission for the officer's employer, for purposes of entitlement to workers' compensation benefits.

The circumstances in which a law enforcement, correctional, or correctional probation officer is deemed to be acting within the course and scope of employment would be broadened possibly to include deviations from employment and personal missions. The bill extends workers' compensation coverage for all sworn officers from all state agencies, in addition to full time, part time and auxiliary police officers and deputies.

The effect of the bill is best illustrated in the following hypothetical example:

A police officer was off duty and on the way home. While stopped at a stop light 2 blocks from home, the deputy sheriff is injured when a car struck the rear of his vehicle. As a *fringe benefit or convenience of his employment,* the deputy sheriff is provided with a sheriff's office vehicle, which he is *allowed to use on personal business and which he was using at the time of the accident.* Is the law enforcement officer's injury covered by workers' compensation while on a personal errand?

Current Law – Probably Not

Under current law, the relevant issue in this hypothetical example would be whether the law enforcement officer was carrying out his primary responsibility, which is the "prevention or detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state." The First District Court of Appeal has held in several cases with similar facts that the law enforcement officer was not carrying out his or her primary responsibility, and therefore was not acting within the course and scope of employment. Thus, it is probable that the deputy sheriff would not recover workers' compensation benefits. More, the First District Court of Appeal held that an officer was covered if the employer specifically designated the activity as part of his employment.

The Bill – Yes

Under the bill, the relevant issue is whether the employee is a law enforcement officer as defined in s. 943.10(14), F.S., and whether the employee is going to or coming from work in an official law enforcement or corrections vehicle. The fact that the officer was on a personal errand at the time of the accident would not be relevant. Because the deputy sheriff is a law enforcement officer and was coming from work in a law enforcement vehicle, he would be presumed to be engaged in a special errand or mission for his or her employer and would be covered by workers' compensation.

Section 2. The bill would become effective upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, s. 18 of the Florida Constitution provides that counties and municipalities are not bound by general laws that require them to spend funds or to take an action that requires the expenditure of funds unless the Legislature determines that the law fulfills an important state interest or meets other select exceptions, such as an insignificant fiscal impact.

There will likely be a fiscal impact on cities and counties, due to a broadened scope of coverage of their sworn law enforcement employees. The fiscal impact on the local governments will be determined by the number and severity of future claims, and the premium increase, if any, resulting from such additional covered claims. The amount is indeterminate and it is unknown whether the amount is significant enough to trigger the protection of Article VII, s. 18.

For cities or counties that currently provide for such coverage through a collective bargaining agreement or other employment agreement there would be no fiscal impact.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent that workers' compensation coverage for law enforcement, correctional, and correctional probation officers is expanded to provide coverage for accidents that were not previously covered (deviations from employment or personal use of the vehicle), this bill may result in the cost shifting of claims, that were previously denied and now would be covered, from the employee to the state or local government and ultimately the taxpayers.

C. Government Sector Impact:

The impact on state agencies that have sworn law enforcement officer is indeterminate at this time. Many state agencies potentially would be impacted. For example, the Department of Business and Professional Regulation has 187 law enforcement officers that are provided unmarked vehicles. The Florida Department of Law Enforcement has approximately 400 sworn law enforcement officers.

The Division of Risk Management estimates that the overall fiscal impact of the bill to state government should not be significant based on case law and experience. The Division currently provides coverage to officers (all employees) when going to or coming from work in a state vehicle unless the employee is engaged in an identifiable deviation from his/her employment for personal reasons that would take the employee out of the course of employment. If the courts interpret the language on Page 1, Line 30 of the bill, "engaged in

a special errand or mission," to extend coverage for what would currently be considered a deviation, there may be an increase in workers' compensation claims paid by the state.

According to the Department of Corrections, the implementation of this bill should not have a significant impact on the overall operations of the agency since correctional and probation officers are not assigned a department vehicle for going or coming to work.

According to the Department of Highway Safety and Motor Vehicles, the implementation of this bill should not have a significant impact on the overall operations of the agency since the agency assumes responsibility for a Highway Patrol officer any time the officer is wearing an official Highway Patrol uniform.

The fiscal impact of this bill is also indeterminate because it is possible that state and local governments, fearing potential increased workers' compensation costs, would discontinue the practice of allowing officers to drive official vehicles to their homes.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Appropriations General Government Subcommittee:
Provides coverage solely for a marked official law enforcement vehicle by deleting the words "or unmarked."

#2 by Appropriations General Government Subcommittee:
Provides that an officer is presumed to be, unless otherwise rebutted, engaged in a special errand or mission for his or her employer rather than "considered."