

By Senator Posey

15-241-02

1 A bill to be entitled
 2 An act relating to workers' compensation;
 3 amending s. 440.02, F.S.; redefining the terms
 4 "construction industry" and "employee" for
 5 purposes of ch. 440, F.S.; amending s. 440.05,
 6 F.S.; revising exemptions from workers'
 7 compensation coverage; limiting the exemptions
 8 granted to partners and officers actively
 9 engaged in the construction industry;
 10 specifying procedures and recordkeeping
 11 requirements for claiming an exemption;
 12 authorizing the Division of Workers'
 13 Compensation to adopt rules; amending s.
 14 440.10, F.S.; limiting the number of persons
 15 who may be exempt from coverage at a
 16 construction job site; providing that a person
 17 who receives remuneration from a subcontractor
 18 is an employee of that subcontractor;
 19 conforming cross-references and provisions to
 20 changes made by the act; providing an effective
 21 date.

22
 23 Be It Enacted by the Legislature of the State of Florida:

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 25 Section 1. Subsections (7) and (14) of section 440.02,
 26 Florida Statutes, are amended to read:

27 440.02 Definitions.--When used in this chapter, unless
 28 the context clearly requires otherwise, the following terms
 29 shall have the following meanings:

30 (7) "Construction industry" means any business that
 31 carries out for-profit activities involving ~~the carrying out~~

1 ~~of~~ any building, clearing, filling, excavation, or substantial
2 improvement in the size or use of any structure or the
3 appearance of any land. ~~When appropriate to the context,~~
4 ~~"construction" refers to the act of construction or the result~~
5 ~~of construction.~~ However, the term "construction" does shall
6 not include mean a homeowner's landowner's act of construction
7 or the result of a construction upon his or her own premises
8 if, provided such premises are not intended to be sold, or
9 resold, or leased by the owner within 1 year after the
10 commencement of the construction.

11 (14)(a) "Employee" means any person, including,
12 without limitation, any alien or minor, who receives
13 remuneration from an employer for the performance of any work
14 or service or the provision of any goods or supplies, whether
15 by engaged in any employment under any appointment or
16 contract, for of hire or apprenticeship, express or implied,
17 oral or written, whether lawfully or unlawfully employed, ~~and~~
18 ~~includes, but is not limited to, aliens and minors.~~

19 (b) ~~"Employee" includes any person who is an officer~~
20 ~~of a corporation and who performs services for remuneration~~
21 ~~for such corporation within this state, whether or not such~~
22 ~~services are continuous.~~

23 1. ~~Any officer of a corporation may elect to be exempt~~
24 ~~from this chapter by filing written notice of the election~~
25 ~~with the division as provided in s. 440.05.~~

26 2. ~~As to officers of a corporation who are actively~~
27 ~~engaged in the construction industry, no more than three~~
28 ~~officers may elect to be exempt from this chapter by filing~~
29 ~~written notice of the election with the division as provided~~
30 ~~in s. 440.05.~~

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1 ~~3. An officer of a corporation who elects to be exempt~~
2 ~~from this chapter by filing a written notice of the election~~
3 ~~with the division as provided in s. 440.05 is not an employee.~~

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5 ~~Services are presumed to have been rendered to the corporation~~
6 ~~if the officer is compensated by other than dividends upon~~
7 ~~shares of stock of the corporation which the officer owns.~~

8 ~~(c) "Employee" includes a sole proprietor or a partner~~
9 ~~who devotes full time to the proprietorship or partnership~~
10 ~~and, except as provided in this paragraph, elects to be~~
11 ~~included in the definition of employee by filing notice~~
12 ~~thereof as provided in s. 440.05. Partners or sole proprietors~~
13 ~~actively engaged in the construction industry are considered~~
14 ~~employees unless they elect to be excluded from the definition~~
15 ~~of employee by filing written notice of the election with the~~
16 ~~division as provided in s. 440.05. However, no more than three~~
17 ~~partners in a partnership that is actively engaged in the~~
18 ~~construction industry may elect to be excluded. A sole~~
19 ~~proprietor or partner who is actively engaged in the~~
20 ~~construction industry and who elects to be exempt from this~~
21 ~~chapter by filing a written notice of the election with the~~
22 ~~division as provided in s. 440.05 is not an employee. For~~
23 ~~purposes of this chapter, an independent contractor is an~~
24 ~~employee unless he or she meets all of the conditions set~~
25 ~~forth in subparagraph (d)1.~~

26 ~~(b)(d)~~ "Employee" does not include:

27 1. An independent contractor, if:

28 a. The independent contractor maintains a separate
29 business with his or her own work facility, truck, equipment,
30 materials, or similar accommodations;

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1 b. The independent contractor holds or has applied for
2 a federal employer identification number, unless the
3 independent contractor is a sole proprietor who is not
4 required to obtain a federal employer identification number
5 under state or federal requirements;

6 c. The independent contractor performs or agrees to
7 perform specific services or work for specific amounts of
8 money and controls the means of performing the services or
9 work;

10 d. The independent contractor incurs the principal
11 expenses related to the service or work that he or she
12 performs or agrees to perform;

13 e. The independent contractor is responsible for the
14 satisfactory completion of work or services that he or she
15 performs or agrees to perform and is or could be held liable
16 for a failure to complete the work or services;

17 f. The independent contractor receives compensation
18 for work or services performed for a commission or on a
19 per-job or competitive-bid basis and not on any other basis;

20 g. The independent contractor may realize a profit or
21 suffer a loss in connection with performing work or services;

22 h. The independent contractor has continuing or
23 recurring business liabilities or obligations; and

24 i. The success or failure of the independent
25 contractor's business depends on the relationship of business
26 receipts to expenditures.

27
28 However, the determination as to whether an individual
29 included in the Standard Industrial Classification Manual of
30 1987, Industry Numbers 0711, 0721, 0722, 0751, 0761, 0762,
31 0781, 0782, 0783, 0811, 0831, 0851, 2411, 2421, 2435, 2436,

1 2448, or 2449, or a newspaper delivery person, is an
2 independent contractor is governed not by the criteria in this
3 paragraph but by common-law principles, giving due
4 consideration to the business activity of the individual.

5 2. A real estate salesperson or agent, if that person
6 agrees, in writing, to perform for remuneration solely by way
7 of commission.

8 3. Bands, orchestras, and musical and theatrical
9 performers, including disk jockeys, performing in licensed
10 premises as defined in chapter 562, if a written contract
11 evidencing an independent contractor relationship is entered
12 into before the commencement of such entertainment.

13 4. An owner-operator of a motor vehicle who transports
14 property under a written contract with a motor carrier which
15 evidences a relationship by which the owner-operator assumes
16 the responsibility of an employer for the performance of the
17 contract, if the owner-operator is required to furnish the
18 necessary motor vehicle equipment and all costs incidental to
19 the performance of the contract, including, but not limited
20 to, fuel, taxes, licenses, repairs, and hired help; and the
21 owner-operator is paid a commission for transportation service
22 and is not paid by the hour or on some other time-measured
23 basis.

24 5. A person whose employment is both casual and not in
25 the course of the trade, business, profession, or occupation
26 of the employer.

27 6. A volunteer, except a volunteer worker for the
28 state or a county, municipality, or other governmental entity.
29 A person who does not receive monetary remuneration for
30 services is presumed to be a volunteer unless there is
31 substantial evidence that a valuable consideration was

1 intended by both employer and employee. For purposes of this
2 chapter, the term "volunteer" includes, but is not limited to:
3 a. Persons who serve in private nonprofit agencies and
4 who receive no compensation other than expenses in an amount
5 less than or equivalent to the standard mileage and per diem
6 expenses provided to salaried employees in the same agency or,
7 if such agency does not have salaried employees who receive
8 mileage and per diem, then such volunteers who receive no
9 compensation other than expenses in an amount less than or
10 equivalent to the customary mileage and per diem paid to
11 salaried workers in the community as determined by the
12 division; and
13 b. Volunteers participating in federal programs
14 established under Pub. L. No. 93-113.
15 7. Any officer of a corporation who elects to be
16 exempt from this chapter.
17 8. A sole proprietor or officer of a corporation who
18 actively engages in the construction industry, and a partner
19 in a partnership that is actively engaged in the construction
20 industry, who elects to be exempt from the provisions of this
21 chapter. Such sole proprietor, officer, or partner is not an
22 employee for any reason until the notice of revocation of
23 election filed pursuant to s. 440.05 is effective.
24 9. An exercise rider who does not work for a single
25 horse farm or breeder, and who is compensated for riding on a
26 case-by-case basis, provided a written contract is entered
27 into prior to the commencement of such activity which
28 evidences that an employee/employer relationship does not
29 exist.
30 10. A taxicab, limousine, or other passenger
31 vehicle-for-hire driver who operates said vehicles pursuant to

1 a written agreement with a company which provides any
2 dispatch, marketing, insurance, communications, or other
3 services under which the driver and any fees or charges paid
4 by the driver to the company for such services are not
5 conditioned upon, or expressed as a proportion of, fare
6 revenues.

7 11. A person who performs services as a sports
8 official for an entity sponsoring an interscholastic sports
9 event or for a public entity or private, nonprofit
10 organization that sponsors an amateur sports event. For
11 purposes of this subparagraph, such a person is an independent
12 contractor. For purposes of this subparagraph, the term
13 "sports official" means any person who is a neutral
14 participant in a sports event, including, but not limited to,
15 umpires, referees, judges, linespersons, scorekeepers, or
16 timekeepers. This subparagraph does not apply to any person
17 employed by a district school board who serves as a sports
18 official as required by the employing school board or who
19 serves as a sports official as part of his or her
20 responsibilities during normal school hours.

21 Section 2. Section 440.05, Florida Statutes, is
22 amended to read:

23 (Substantial rewording of section. See
24 s. 440.05, F.S., for present text.)
25 440.05 Exemption from coverage.--

26 (1) The following classes of persons are, as limited
27 by subsection (2), exempt from coverage required by this
28 chapter unless they elect otherwise in accordance with
29 subsection (3):

30 (a) A sole proprietor and the spouse of a sole
31 proprietor;

1 (b) A partner; and

2 (c) A corporate officer.

3 (2)(a) Not more than three partners in a partnership
4 that is actively engaged in the construction industry may be
5 exempt from coverage.

6 (b) Not more than three officers of a corporation that
7 is actively engaged in the construction industry may be exempt
8 from coverage.

9 (3) Any person who is exempted from this chapter by
10 this section who secures, or whose employer secures for him or
11 her, workers' compensation insurance coverage is subject to
12 the provisions of this chapter.

13 (4) Each enterprise conducting business in this state
14 shall maintain business records as specified by the division
15 by rule, which rules must include the provision that any
16 corporation with exempt officers and any partnership with
17 exempt partners must maintain written statements by those
18 exempted persons affirmatively acknowledging his or her exempt
19 status.

20 (5) Any sole proprietor or partner claiming an
21 exemption under this section shall maintain a copy of his or
22 her federal income tax records for each of the immediately
23 preceding 3 years in which he or she claims an exemption. Such
24 federal income tax records must include a complete copy of the
25 following for each year in which an exemption is claimed:

26 (a) For sole proprietors, a copy of Federal Income Tax
27 Form 1040 and its accompanying Schedule C;

28 (b) For partners, a copy of the partner's Federal
29 Income Tax Schedule K-1 (Form 1065) and Federal Income Tax
30 Form 1040 and its accompanying Schedule E. The sole proprietor
31 or partner in question shall produce, upon request by the

1 division, a copy of those documents together with a statement
2 by the sole proprietor that the tax records provided are true
3 and accurate copies of what the sole proprietor or partner has
4 filed with the federal Internal Revenue Service. The statement
5 must be signed under oath by the sole proprietor or partner in
6 question and must be notarized. The division shall issue a
7 stop-work order under s. 440.107(5) to any sole proprietor or
8 partner who fails or refuses to produce a copy of the tax
9 records and affidavit required under this paragraph to the
10 division within 3 business days after that request and who has
11 failed to otherwise secure insurance for the provision of
12 workers' compensation benefits for himself or herself if
13 required under this chapter to do so.

14 (6) Any corporate officer claiming an exemption under
15 this section must be listed on the records of this state's
16 Secretary of State, Division of Corporations, as a corporate
17 officer. If the person who claims exemption as a corporate
18 officer is not so listed on the records of the Secretary of
19 State, the individual must provide to the division, upon
20 request by the division, a notarized affidavit stating that
21 the individual is a bona fide officer of the corporation and
22 stating the date his or her appointment or election as a
23 corporate officer became or will become effective. The
24 statement must be signed under oath by both the officer in
25 question and the president or chief operating officer of the
26 corporation and must be notarized. The division shall issue a
27 stop-work order under s. 440.107(5) to any person who claims
28 to be exempt as a corporate officer but who fails or refuses
29 to produce the documents required under this subsection to the
30 division within 3 business days after the request is made and
31 who has failed to otherwise secure the insurance of workers'

1 compensation benefits for himself or herself if required under
2 this chapter to do so.

3 (7) A sole proprietor, partner, or corporate officer
4 of a business entity that has not been in operation long
5 enough to have filed with the Internal Revenue Service, or to
6 have been required by the Internal Revenue Service to file,
7 its first annual federal income tax return is not eligible for
8 exemption from this chapter.

9 (8) Exemptions pertain only to the person claiming
10 exemption and only for the entity that is the subject of the
11 federal income tax reports filed by the person claiming the
12 exemption. A separate exemption is required for every
13 proprietorship, partnership, or corporation from which an
14 individual receives any remuneration for labor, services, or
15 products provided.

16 Section 3. Section 440.10, Florida Statutes, is
17 amended to read:

18 440.10 Liability for compensation.--

19 (1)(a) Every employer coming within the provisions of
20 this chapter, including any brought within the chapter by
21 waiver of exclusion or of exemption, shall be liable for, and
22 shall secure, the payment to his or her employees, or any
23 physician, surgeon, or pharmacist providing services under the
24 provisions of s. 440.13, of the compensation payable under ss.
25 440.13, 440.15, and 440.16. Any contractor or subcontractor
26 who engages in any public or private construction in the state
27 shall secure and maintain compensation for his or her
28 employees under this chapter as provided in s. 440.38.

29 (b)1. In case a contractor sublets any part or parts
30 of his or her contract work to a subcontractor or
31 subcontractors, all of the employees of such contractor and

1 subcontractor or subcontractors engaged on such contract work
2 shall be deemed to be employed in one and the same business or
3 establishment; and the contractor shall be liable for, and
4 shall secure, the payment of compensation to all such
5 employees, except to employees of a subcontractor who has
6 secured such payment.

7 2. Subject to all other requirements for exemptions
8 from coverage, not more than three persons per trade per job
9 site may be exempt from coverage. The general contractor shall
10 maintain on each job site current records of the name and
11 federal employer identification number or, if such a number is
12 not required, the social security number, of each person who
13 is being paid by the general contractor or by a subcontractor
14 for work performed on that job site but who is exempt from
15 coverage. As used in this subparagraph, the term "job site"
16 means a project as that project is defined by the relevant
17 building permit. The term "trade" means an occupation for
18 which a license is required from the Department of Business
19 and Professional Regulation. The division shall adopt rules
20 defining the term "trade" for purposes of an occupation that
21 is not licensed by the Department of Business and Professional
22 Regulation.

23 3. Any person who receives remuneration from a
24 subcontractor for performing any work or services at a
25 construction job site is an employee of the subcontractor and
26 may not be classified as an independent contractor or sole
27 proprietor for purposes of the work performed pursuant to that
28 relationship. However, such person may be exempt from coverage
29 as a partner or corporate officer, subject to the requirements
30 of s. 440.05.

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1 (c) A contractor may require a subcontractor to
2 provide evidence of workers' compensation insurance or a copy
3 of a written statement acknowledging his or her exempt status
4 as specified in s. 440.05 ~~certificate of election~~. A
5 subcontractor electing to be exempt as a sole proprietor,
6 spouse of the sole proprietor, partner, or officer of a
7 corporation shall provide a copy of such written statement ~~his~~
8 ~~or her certificate of election~~ to the contractor.

9 (d)1. If a contractor becomes liable for the payment
10 of compensation to the employees of a subcontractor who has
11 failed to secure such payment in violation of s. 440.38, the
12 contractor or other third-party payor shall be entitled to
13 recover from the subcontractor all benefits paid or payable
14 plus interest unless the contractor and subcontractor have
15 agreed in writing that the contractor will provide coverage.

16 2. If a contractor or third-party payor becomes liable
17 for the payment of compensation to the employee of a
18 subcontractor who is actively engaged in the construction
19 industry and has elected to be exempt from the provisions of
20 this chapter, but whose election is invalid, the contractor or
21 third-party payor may recover from the claimant, partnership,
22 or corporation all benefits paid or payable plus interest,
23 unless the contractor and the subcontractor have agreed in
24 writing that the contractor will provide coverage.

25 (e) A subcontractor is not liable for the payment of
26 compensation to the employees of another subcontractor on such
27 contract work and is not protected by the
28 ~~exclusiveness-of-liability~~ provisions of s. 440.11 from action
29 at law or in admiralty on account of injury of such employee
30 of another subcontractor.

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1 (f) If an employer willfully fails to secure
2 compensation as required by this chapter, the division may
3 assess against the employer a penalty not to exceed \$5,000 for
4 each employee of that employer who is classified by the
5 employer as an independent contractor but who is found by the
6 division to not meet the criteria for an independent
7 contractor that are set forth in s. 440.02.

8 (g) For purposes of this section, a person other than
9 a person specified in subparagraph (b)3. is conclusively
10 presumed to be an independent contractor if:

11 1. The independent contractor provides the general
12 contractor with an affidavit stating that he or she meets all
13 the requirements of s. 440.02(14)(b)~~s. 440.02(14)(d)~~; and

14 2. The independent contractor provides the general
15 contractor with a valid certificate of workers' compensation
16 insurance or a written statement acknowledging his or her
17 exempt status as specified in s. 440.05 ~~a valid certificate of~~
18 ~~exemption issued by the division.~~

19
20 A sole proprietor, partner, or officer of a corporation who is
21 exempt ~~elects exemption~~ from this chapter pursuant to ~~by~~
22 ~~filing a certificate of election under~~ s. 440.05 may not
23 recover benefits or compensation under this chapter. An
24 independent contractor who provides the general contractor
25 with both an affidavit stating that he or she meets the
26 requirements of s. 440.02(14)(b)~~s. 440.02(14)(d)~~ and a
27 written statement acknowledging his or her exempt status
28 certificate of exemption is not an employee under s.
29 440.02(14)(a)~~s. 440.02(14)(c)~~ and may not recover benefits
30 under this chapter. For purposes of determining the
31 appropriate premium for workers' compensation coverage,

1 carriers may not consider any person who meets the
2 requirements of this paragraph to be an employee.

3 (2) Compensation shall be payable irrespective of
4 fault as a cause for the injury, except as provided in s.
5 440.09(3).

6 Section 4. This act shall take effect October 1, 2002.

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SENATE SUMMARY

10 Redefines the term "construction industry" to clarify
11 that, for purposes of ch. 440, F.S., the Workers'
12 Compensation Law, the term does not include a homeowner's
13 construction upon his or her own premises. Redefines the
14 term "employee" to include a person who receives
15 remuneration from an employer. Deletes provisions
16 defining "employee" to mean, under certain circumstances,
17 an officer of a corporation, a sole proprietor, or a
18 partner. Limits the number of exemptions from the
19 Workers' Compensation Law which may be granted to the
20 partners of a partnership or the officers of a
21 corporation. Limits the number of exemptions from the
22 Workers' Compensation Law which may be granted to
23 employees at a job site. (See bill for details.)
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