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: CS/SB 1706

SPONSOR: Commerce, Economic Opportunities, and Consumer Services Committee and Senator Posey

SUBJECT: Entertainment Industry

DATE: April 8, 2003 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gillespie	Maclure	CM	Favorable/CS
2.			GO	
3.				
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 1706 prohibits certain employment practices by employers or labor organizations in the entertainment industry based on an employee's membership or non-membership in a labor organization or payment or nonpayment of initiation fees, membership dues, or financial-core fees to a labor organization. The committee substitute provides criminal penalties for violations and authorizes civil actions for damages, costs, and attorney's fees. The committee substitute voids union-security agreements between employers and labor organizations which require violations and provides for the resolution of conflicts with federal law and regulations. The committee substitute also requires state agencies, political subdivisions, contractors, and subcontractors to give preference to qualified production companies in the procurement of entertainment production services with public funds.

This committee substitute reenacts and substantially amends section 447.17, Florida Statutes. The committee substitute also creates s. 447.095, F.S., reenacts s. 447.14, F.S., and creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Florida's Film and Entertainment Industry

According to a 2001 report by the United States Department of Commerce, six states (California, New York, Texas, Florida, Illinois, and North Carolina) account for approximately 88 percent of national revenues from the motion picture industry, with Florida representing 7 percent of the

industry.[1] In 1999, Florida's film and entertainment industry accounted for more than 39,000 full-time-equivalent employees and more than 3,500 employers, and added about $3.9 billion in total revenues to the state's economy.[2] In the late 1980s, Florida became the site of two large studios: Universal Studios and Disney/MGM, both located in Orlando. Direct expenditures by motion picture producers in Orlando were $390 million in 1999 and $432 million in 2000.[3] In Miami, producers spent $31 million in 1999 and $160 million in 2000.

Various state agencies and economic development public-private partnerships purchase production services on behalf of the state which are provided by the entertainment industry. For example, the Florida Tourism Industry Marketing Corporation (commonly cited as "VISIT FLORIDA") produces television commercials broadcast nationally and internationally to promote Florida tourism.

Under current law, for purposes of economic development programs, the term "entertainment industry is defined as:

> those persons or entities engaged in the operation of motion picture or television studios or recording studios; those persons or entities engaged in the preproduction, production, or postproduction of motion pictures, made-for-TV motion pictures, television series, commercial advertising, music videos, or sound recordings; and those persons or entities providing products or services directly related to the preproduction, production, or postproduction of motion pictures, made-for-TV motion pictures, television series, commercial advertising, music videos, or sound recordings, including, but not limited to, the broadcast industry (s. 288.125, F.S.).

National Labor Relations Act

In 1947, the United States Congress enacted the federal Labor Management Relations Act, also known as the Taft-Hartley Labor Act, which amended the National Labor Relations Act.[4] Among other things, the federal act prohibited the "closed shop." A closed shop is a business in which the employer, by agreement with a union, hires and retains in employment only union members in good standing. The federal act did not, however, prohibit "union shop" (also commonly cited as "agency shop") or "preferential shop" arrangements. In a union shop, the employer may hire nonunion members on the condition that they join a union within a specified time after a grace period of at least 30 days. In a preferential shop, union members are given preference over nonunion members in employment matters.

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[1] U.S. Department of Commerce, *Migration of U.S. Film and Television Production* 25-26 (Jan. 1, 2001), *available at* http://www.ita.doc.gov/media/migration11901.pdf (last visited Apr. 3, 2003).

[2] MGT of America, Inc., *An Economic Assessment of the Florida Film and Entertainment Industry* 3-23 (Dec. 31, 2000).

[3] *See, e.g.,* Martha Jones, *Motion Picture Production in California* 30 (Mar. 2002), *available at* http://www.library.ca.gov/crb/02/01/02-001.pdf (last visited Apr. 3, 2003).

[4] The National Labor Relations Act was commonly cited as the Wagner Act.

Florida's Right-to-Work Amendment

Parallel to Congress' prohibition of the closed shop, in 1943, the Florida Legislature proposed an amendment to the State Constitution establishing a "right to work," which was approved by the voters of Florida at the 1944 general election. The right-to-work amendment prohibited the right of persons to work from being denied or abridged on account of membership or non-membership in any labor organization. Thus, the practical effect of the amendment was to prohibit closed shop, union shop, and preferential shop arrangements, thereby mandating an "open shop" arrangement for all employers. In an open shop, union membership is not a condition of employment.

In addition to requiring the open shop in Florida, the right-to-work amendment also protected the right of employees, by and through a labor organization, to collectively bargain. Accordingly, the right-to-work amendment did not disallow labor unions or collective bargaining, but prevented employers from requiring employees to become union members as a condition of employment and prevented employers from giving preference to union members.

The right-to-work amendment remains a part of the Florida Constitution:

> ARTICLE I
> DECLARATION OF RIGHTS
> SECTION 6. Right to work.—The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.[5]

Union-Security Agreements

Section 8(a)(3) of the National Labor Relations Act prohibits an employer from discriminating in regard to hiring, tenure of employment, or any term or condition of employment to "encourage or discourage membership in any labor organization" (29 U.S.C. s. 158(a)(3)). However, notwithstanding this provision, section 8(a)(3) allows an employer to make an agreement with a labor organization that requires, as a condition of employment, membership in the labor organization on or after the 30th day after the beginning of employment or the effective date of the agreement, whichever is the later (*id.*). These agreements between employers and labor organizations, requiring employees to join the labor organizations within a specified period after the beginning of employment (commonly cited as a "grace period") and pay initiation fees and membership dues to the labor organizations, are generally known as "union-security agreements." A union-security agreement is a mechanism by which a labor organization establishes a "union shop" arrangement.

Section 8(a)(3) also prohibits an employer from discriminating against an employee for non-membership in a labor organization if the employer has reason to believe that "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic

[5] Section 6, Art. I of the State Constitution.

dues and the initiation fees uniformly required as a condition of acquiring or retaining membership" (*id.*). In 1954, the United States Supreme Court interpreted this provision as prohibiting employers from compelling employees to be active members of a labor organization, but allowing employers to require employees to become dues-paying nonmembers.[6] Employees choosing to become dues-paying nonmembers may be required to pay the full amount of the initiation fees and membership dues paid by employees who actually join the labor organization. These payments by nonmembers in lieu of initiation fees and membership dues are commonly cited as "financial-core fees."

Because federal law specifically permits union-security agreements, a state would also be required to allow these agreements, except that section 14(b) of the National Labor Relations Act specifically authorizes states to prohibit union-security agreements:

> Nothing in [the National Labor Relations Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law (29 U.S.C. s. 164(b)).

Florida's right-to-work amendment (s. 6, Art. I of the State Constitution) effectively prohibits employers from enforcing union-security agreements in this state, requiring employees to join a labor organization, or pay financial-core fees.

Under current law, employees have the right to "self-organization, to form, join, or assist labor unions or labor organizations or to refrain from such activity" (s. 447.03, F.S.). Any person who is denied employment or discriminated against in employment on account of membership or non-membership in a labor organization is entitled to bring suit against the discriminating employer or labor organization for damages, costs, and attorney's fees (s. 447.17(1), F.S.). If the discrimination is willful and with malice or demonstrates reckless indifference to the rights of others, punitive damages are authorized. An aggrieved employee is also entitled to injunctive relief, including against a threat of discrimination, against the discriminating employer or labor organization (s. 447.17(2), F.S.). Criminal violations are punishable as a misdemeanor of the second degree, subject to a $500 fine and no more than 60 days in jail (s. 447.14, F.S.).

Florida's Film and Entertainment Labor Organizations

There are at least six labor organizations currently operating in Florida that focus on employment in the film and entertainment industry, which include the following:[7]

- Actors Equity Association (AEA);
- American Federations of Television and Radio Artists (AFTRA);
- Directors Guild of America (DGA);

[6] *Radio Officers' Union of Commercial Telegraphers Union v. National Labor Relations Board,* 347 U.S. 17 (1954).

[7] *See* Governor's Office of Film & Entertainment, *Guilds, Unions & Associations, at* http://www.filminflorida.com/production/prod-gua.htm (last visited Apr. 3, 2003).

- International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts (IATSE);
- International Brotherhood of Teamsters; and
- Screen Actors Guild (SAG).

Most labor organizations in the film and entertainment industry generally discourage employees from working for producers that do not require a "union shop" arrangement in which producers sign union-security agreements with the labor organizations and employees are required to join the applicable labor organization. For example, the Screen Actors Guild has adopted Global Rule One, which provides that "[n]o member shall work as a performer or make an agreement to work as a performer for any producer who has not executed a basic minimum agreement with the Guild which is in full force and effect."[8] Global Rule One essentially prohibits an actor who is a member of the Screen Actors Guild from working for any production company that has not executed a union-security agreement with the guild.

Florida-Based Procurement Preferences

Under current law, each state agency, county, municipality, school district, or other political subdivision of the state is permitted to give preference in competitive bids for procurement of personal property, except for transportation projects, to a Florida-based business when the lowest responsible and responsive bidder has its principal place of business in a state or political subdivision that gives preferences in procurement to its businesses (s. 287.084, F.S.). State agencies are required to give preference to Florida-based printers when printing can be done at a comparable level of quality and at no greater price than an out-of-state printer (s. 283.35, F.S.). Further, the state must also give preference to the procurement of commodities manufactured, grown, or produced within this state when two or more competitive sealed bids are received and are equal with respect to price, quality, and service (s. 287.082, F.S.).

Florida's Tax Incentives for Qualified Production Companies

Under current law, production companies in the entertainment industry are eligible for several exemptions from the sales and use tax. In 2000, the Legislature authorized qualified production companies to obtain a single certificate of exemption which allows the companies to benefit from these exemptions by not having to pay tax at the point of sale, rather than by having to seek reimbursement or refund of the tax.[9] Each production company engaged in this state in the production of motion pictures, made-for-TV motion pictures, television series, commercial advertising, music videos, or sound recordings is eligible to apply for a certificate of exemption (s. 288.1258(1)(a), F.S.). A production company that has operated a business in Florida at a permanent address for 12 consecutive months may obtain a certificate of exemption which is valid for 1 year and which may annually be renewed for up to 5 years. Other production companies may obtain a certificate of exemption which is valid for 90 days (s. 288.1258(3), F.S.). These qualified production companies are eligible for tax exemptions under ss. 212.031, 212.06, and 212.08, F.S.:

[8] Screen Actors Guild, *Global Rule One, at* http://www.sag.org/rule_one/ (last visited Apr. 3, 2003).

[9] Chapter 2000-182, L.O.F.; s. 288.1258, F.S.

- ***Lease or rental of real property.—***Exempts from tax the lease or rental of real property that is used as an integral part of an activity or service performed directly in connection with the production of a qualified motion picture (e.g., photography, sound and recording, casting, location managing and scouting, shooting, creation of special and optical effects, animation, adaptation, etc.) (s. 212.031(1)(a)9., F.S.,).
- ***Fabrication labor.—***Exempts fabrication labor from tax when a motion picture producer uses his or her own equipment and personnel to produce a qualified motion picture (s. 212.06(1)(b), F.S.).
- ***Production equipment.—***Exempts from tax the purchase or lease of motion picture and video equipment, and of sound recording equipment, used in Florida for motion picture or television production or for the production of master tapes or master records (s. 212.08(5)(f), F.S.).
- ***Master tapes.—***Exempts from tax the sale, lease, storage, or use in Florida of master tapes or records for sound recordings, master films, and master video tapes, but subjects to the tax payments to recording studios and motion picture or television studios for the tangible elements of the tapes, records, films, or videos (s. 212.08(12), F.S.).

The Governor's Office of Film and Entertainment, in cooperation with the Department of Revenue, developed a standardized application form for use in approving qualified production companies.[10] Under current law, a production company must apply for the certificate of exemption to the Department of Revenue (s. 288.1258(2)(a), F.S.). The department forwards the application to the Office of Film and Entertainment, which must approve or deny the application based on the established approval criteria. If the Office of Film and Entertainment approves an application, the Department of Revenue issues the certificate of exemption to the qualified production company (s. 288.1258(2)(b)2., F.S.).

Barry Plans

Mr. Barry Plans is a member of the Florida Film and Entertainment Advisory Council, having been appointed to the council by the Speaker of the House of Representatives. Mr. Plans is president of Studio B Productions, Inc., a company in the entertainment industry based in Cape Canaveral, Florida. Mr. Plans is a resident of Cocoa Beach, Florida.

III. Effect of Proposed Changes:

The committee substitute creates the "Barry Plans Florida Entertainment Industry Equity Act."

Right to Work in Entertainment Industry

The committee substitute specifies that the right-to-work provision of the State Constitution (s. 6, Art. I) applies to the entertainment industry in this state. The committee substitute prohibits an employer in the entertainment industry from refusing to hire an employee; fining, discharging,

[10] Department of Revenue, *Entertainment Industry Qualified Production Company Application for Certificate of Exemption,* Form DR-230 (Mar. 2001), *available at* http://www.myflorida.com/dor/forms/2001/DR230-i.pdf (last visited Mar. 30, 2003); s. 288.1258(2)(c), F.S.

disciplining, or otherwise discriminating against an employee; or threatening to fine, discharge, discipline, or otherwise discriminate against an employee based on the employee's:

- Membership or non-membership in a labor organization;
- Agreement or refusal to join a labor organization after a grace period or within a specified period of time; or
- Payment or nonpayment of initiation fees or membership dues, or any other type of payment in lieu of initiation fees or membership dues, including, but not limited to, financial-core fees, to a labor organization.

The committee substitute prohibits a labor organization from fining, suspending, expelling, or otherwise disciplining a member of the labor organization who is or was employed by an employer in the entertainment industry which complies with the requirements of the committee substitute. The committee substitute also prohibits a labor organization from fining or otherwise disciplining an employer, based on an agreement (i.e., union-security agreement) between the employer and the labor organization, because the employer complies with the requirements of the committee substitute.

The committee substitute provides that an employer or labor organization that violates these requirements commits a misdemeanor of the second degree, punishable by up to 60 days in jail and a $500 fine. In addition, a person or employer sustaining an injury as a result of a violation may bring suit against the employer or labor organization for damages, costs, and attorney's fees. If a violation is willful and with malice or demonstrates reckless indifference to the rights of others, punitive damages may be awarded. An aggrieved person or employer is also entitled to injunctive relief, including against a threat of a violation, against the employer or labor organization.

The committee substitute voids union-security agreements between employers and labor organizations which require an employer to violate the requirements of the committee substitute. The committee substitute also specifies that federal law or regulations shall control in the event of a conflict between the committee substitute and the federal law or regulations.

Procurement Preference for Qualified Production Companies

The committee substitute requires that preference in procurement with public funds of services provided by the entertainment industry be given to qualified production companies that hold valid certificates of exemption issued by the Department of Revenue based on the approval of the Governor's Office of Film and Entertainment that each company meets the qualifications under current law to be a qualified production company (*see* s. 288.1258, F.S.). The committee substitute applies to contracts issued by state agencies, political subdivisions, and the contractors or subcontractors of an agency or political subdivision.

The committee substitute requires that preference be given to a qualified production company when the agency, political subdivision, contractor, or subcontractor receives at least two competitive bids; the bids are equal with respect to quality, design, workmanship, and service; and the bids are within 2 percent with respect to price.

Although the committee substitute requires that preference in contracting be given to a qualified production company, the committee substitute does not specify whether a qualified production company is eligible for preference if it holds a 90-day certificate of exemption or whether a 1-year certificate of exemption is required.

Effective Date

The bill provides an effective date of October 1, 2003.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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:

The committee substitute requires that preference be given to qualified production companies for procurement of entertainment production services with public funds. Accordingly, these qualified production companies may benefit from additional contracts awarded by state agencies, political subdivisions, and their contractors and subcontractors.

C. Government Sector Impact:

The committee substitute requires state agencies, political subdivisions, and their contractors and subcontractors to give preference to qualified production companies for procurement with public funds of entertainment production services when two or more competitive bids are received. The committee substitute requires, however, that preference be given only when the bids are equal with respect to quality, design, workmanship, and service and are within 2 percent with respect to price.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.