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 2268

SPONSOR: Banking and Insurance Committee

SUBJECT: Workers' Compensation

DATE: March 18, 2004 REVISED: 03/24/04

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Deffenbaugh	BI	Fav/CS
2.	Clodfelter	Cannon	CJ	Fav/3 amendments
3.				
4.				
5.				
6.				

I. Summary:

Senate Bill 50-A enacted significant changes to the workers' compensation laws in the 2003 Special Session A. Concerns were raised in the Senate regarding the legal effect of various provisions and possible unintended consequences that were subsequently addressed in a staff interim report entitled, *Review of the 2003 Workers' Compensation Act.*[1] This committee substitute incorporates the recommendations of this interim report, except for recommendations relating to the Workers' Compensation Joint Underwriting Association which are addressed in Senate Bill 2270. This committee substitute provides the following changes relating to workers' compensation:

- Eliminates the provision that it is a felony and insurance fraud for a person to present false identification as to evidence of identity for the purpose of obtaining employment;
- Eliminates the provision that it is a misdemeanor for an employer to knowingly participate in the creation of the employment relationship in which an employee has used any false, fraudulent, or misleading oral or written statement as evidence of identity;
- Eliminates the provision that included within the definition of "employer" employment agencies and similar agencies that supply employees, due to uncertainty regarding the full impact of this change;
- Provides an exception for the physical injury requirement for the compensability of mental stress or injury in instances of certain violent crimes which would allow these employees to obtain workers' compensation benefits for mental stress or injury that occurs without an accompanying physical injury;
- Clarifies that a volunteer for a state or local government is considered to be an employee to ensure that such persons are covered by workers' compensation;

[1] Interim Project Report 2004-110.

- Provides conforming changes for exemptions in the construction industry for up to three members of a limited liability company;
- Allows members of a limited liability company engaged in the construction industry to provide proof of interest in the company by submitting a certificate of membership for the purpose of obtaining an exemption from workers' compensation coverage;
- Allows a member of a limited liability company not engaged in the construction industry to elect to be considered an employee; otherwise, the member would be exempt from coverage requirements;
- Deletes the provision that makes it a misdemeanor for violating a stop-work order while retaining the felony penalty provision for a knowing violation of a stop-work order;
- Requires that as a condition of receiving compensation, an employee must execute a waiver authorizing the carrier to obtain wage information from the State of Florida to determine whether an injured worker is employed and concurrently receiving workers' compensation benefits;
- Clarifies that the valuation of attendant care provided by a family member who remains employed equals the per-hour value of the family member's employment;
- Eliminates a conflicting penalty provision relating to the late payment of medical bills;
- Incorporates certain violations of ch. 440, F.S., in the Offense Severity Ranking Chart which would assist in the prosecution and sentencing of fraud by establishing ranking of these violations; and
- Clarifies applicable practice parameters for ch. 440, F.S.

This bill substantially amends the following sections of the Florida Statutes: 440.02, 440.05, 440.077, 440.093, 440.105, 440.106, 440.107, 440.13, 440.14, 440.20, 440.381, 440.525, and 921.0022.

II. Present Situation:

Due to growing concerns regarding the availability and affordability of workers' compensation insurance in Florida, legislation was enacted in 2003 that substantially revised many aspects of the workers' compensation law.[2] The changes provided in Senate Bill 50-A were designed to reduce costs, expedite the dispute resolution process, provide greater enforcement and compliance authority for the Division of Workers' Compensation to combat fraud, provide affordable coverage for small employers, revise certain indemnity benefits, and increase medical reimbursement fees for physicians and surgical procedures. Because of this legislation, rates for new and renewal policies that are effective on or after October 1, 2003, were reduced by 14.0 percent.

Criminal Penalties Related to Employees Who Use False Evidence of Identity

Senate Bill 50-A contained two criminal penalties that may impact the issue of whether illegal alien employees are entitled to receive workers' compensation benefits if injured on the job, but

[2] Senate Bill 50-A; ch. 2003-412, L.O.F.

it is not clear if this was intended. The first provision was the amendment to s. 440.105(4)(b), F.S., which provided that it is a felony and insurance fraud for a person:[3]

> *9. To knowingly present or cause to be presented any false, fraudulent, or misleading oral or written statement to any person as evidence of identity for the purpose of obtaining employment or filing or supporting a claim for workers' compensation benefits.*

The second provision, s. 440.105(3), F.S., was amended to make it a first-degree misdemeanor for an employer to commit the following act:

> *(b) It shall be unlawful for any employer to knowingly participate in the creation of the employment relationship in which the employee has used any false, fraudulent, or misleading oral or written statement as evidence of identity.*

Illegal or unauthorized aliens are not precluded from receiving benefits for work-related injuries under Florida's workers' compensation law. Such workers come within the definition of "employee" under s. 440.02(15)(a), F.S., which specifies that an employee means "any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment … whether lawfully or unlawfully employed, and includes, but is not limited to, aliens…"

Under current Florida law relating to terms and conditions of employment, it is a noncriminal violation for any person to knowingly employ, hire, or recruit, for private or public employment within the state, an alien who is not duly authorized to work by the immigration laws or the Attorney General of the United States.[4]

At the federal level, immigration laws make it unlawful for employers to knowingly hire undocumented workers and for employees to use fraudulent documents to establish employment eligibility. The Immigration Reform and Control Act of 1986 (IRCA) establishes an extensive employment verification system to deny employment to aliens who: (a) are not lawfully present in the U.S., or (b) are not lawfully authorized to work in the U.S. Under the IRCA, employers must verify the identity and eligibility of all new hires by examining specified documents before they begin work.[5] If an employer unknowingly hires an unauthorized alien or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status.

As amended by Senate Bill 50-A, the law now provides that it is a felony and insurance fraud for a person to knowingly present any false or misleading oral or written statement as evidence of identity for the purpose of obtaining employment. Therefore, if an illegal alien obtained his employment by misrepresenting his identity in order to get a job, then that person could be found

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[3] The penalties for committing insurance fraud range from a third to a first-degree felony, depending on the monetary value of the violation.

[4] Section 448.09, F.S. The noncriminal violation is a civil fine of not more than $500, regardless of the number of aliens with respect to whom the violation occurred. Any person previously convicted of a noncriminal violation and who thereafter violates this provision, is guilty of a misdemeanor of the second-degree (sixty days in jail and a $500 fine).

[5] Under the Immigration Reform and Control Act of 1986, employers are subject to criminal and civil sanctions for violating the Act with criminal penalties providing for imprisonment of up to five years and civil penalties ranging up to $10,000.

to have committed insurance fraud and thus ultimately denied benefits if injured on the job. Pursuant to s. 440.09(4), F.S., an employee is not entitled to compensation benefits if a judge of compensation claims determines that the employee has knowingly or intentionally committed insurance fraud or any criminal act for the purpose of securing workers' compensation benefits.

Representatives with the Division of Insurance Fraud of the Department of Financial Services state that the purpose of this amendment was to facilitate the arrest and prosecution of illegal aliens who have misrepresented their identity in order to obtain employment and then falsified their on-the-job injury. These officials claim that often illegal aliens are in league with unethical doctors and lawyers who defraud the workers' compensation system. These officials also state that it is often easier to prove that the illegal alien misrepresented his or her identity in order to obtain work than it is to prove the job related injury was fabricated.

Those who criticize this provision state that the provision is overly broad and could encompass anyone who "misleads" a prospective employer about their identity, no matter how minor the fabrication, even though there may be no causal relationship between the misrepresentation and the injury at issue. Further, this provision could provide an incentive to employers to seek out illegal aliens as employees in order to avoid paying benefits if such workers were injured, and thus obtain a competitive advantage.

Senate Bill 50-A also amended the law to make it a first-degree misdemeanor for an employer to knowingly participate in the creation of the employment relationship in which the employee has used any false, fraudulent, or misleading oral or written statement as evidence of identity. This provision penalizes employers if they have knowledge of the employee's use of a false or misleading statement as evidence of identity relating to an employment relationship. Concern was expressed during Senate floor debates relative to this provision that, taken literally, the language could be interpreted to mean that the employer must merely know that an employment relationship was created, without knowledge that the employee used any false, fraudulent, or misleading statement as evidence of identity. However, this interpretation is not likely to be embraced by the courts and it is more likely to be read in a light more favorable to the employer, to require knowledge of the employee's use of a false statement as evidence of identity. The Florida Statutes and case law provide that if a criminal statute is susceptible to more than one meaning, or the meaning is in doubt, the statute must be construed in favor of the accused.[6]

Compensability Standards for Mental and Nervous Injuries

Prior to the enactment of Senate Bill 50-A, a mental or nervous injury due to stress, fright, or excitement only, did not qualify as an accidental injury and was not compensable.[7] The law also required that mental or nervous injuries occurring as a manifestation of a compensable injury must be demonstrated by clear and convincing evidence.[8] Florida case law determined that a mental or nervous injury, even with a physical injury or accident, was not compensable unless the physical injury was the causal factor.[9] The Florida Supreme Court stated:

[6] Section 775.021(1), F.S. (2003); *State v. Byars*, 823 So.2d 702 (Fla. 2002); *Allure Shoe Corp. v. Lymberis*, 173 So.2d 702 (Fla. 1965).
[7] Section 440.02(1), F.S. (2002).
[8] Section 440.09(1), F.S. (2002).
[9] *City of Holmes Beach v. Grace*, 598 So. 2d 71 (Fla. 1989).

> *For a mental or nervous injury to be compensable in Florida there must have been a physical injury. Otherwise, the disability would have been caused only by a mental stimulus, and must be denied coverage under the statutory exclusion. A mere touching cannot suffice as a physical injury*.[10]

Subsequently, the Florida First District Court of Appeal held that eligibility for compensation for psychiatric injury resulting from compensable work-related physical injury required a finding by clear and convincing evidence that the mental or nervous injury was directly linked to the initial injury, not that the physical injury was the major contributing cause of the psychiatric injury.[11]

Senate Bill 50-A continued the mental nervous injury exclusions and the clear and convincing evidence standard noted above and codified case law that prohibits the payment of benefits for mental or nervous injuries without an accompanying physical injury; however, the law also provided that the physical injury must require medical treatment. Before the 2003 legislative changes, case law provided that the lack of medical treatment was relevant to whether or not a sufficient injury had been sustained. The new law requires that the compensable physical injury be the major contributing cause of the mental or nervous injury.[12] The act also provided that a physical injury resulting from a mental or nervous injury unaccompanied by a physical trauma requiring medical treatment is not compensable. It limited the duration of "temporary benefits" for a compensable mental or nervous injury to no more than six months after the employee reaches maximum medical improvement for the physical injury. In context, this six-month limitation is understood to apply to the temporary disability benefits payable under s. 440.15, F.S., but not to medical benefits payable under s. 440.13, F.S. If a permanent psychiatric impairment results from the accident, permanent impairment benefits are limited to one percent for the psychiatric permanent impairment.

Staff reviewed mental or nervous injury compensability provisions in other states. Twenty-one states, including Florida, provide compensation for mental stress only if a compensable physical injury occurs. Arkansas and Oklahoma allow an exception for the physical injury requirement in instances of rape or violent crime, respectively.

Status of Employment Agencies as Employers

Senate Bill 50-A changed the definition of "employer" for purposes of the workers' compensation law to include "employment agencies, employee leasing companies, and similar agents that supply employees to other persons."[13] Previously these entities were not expressly included in the definition of employer.[14] The term "employment agency," is not defined in ch. 440, F.S. The workers' compensation statutes provide that the employer must pay compensation benefits if the employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of employment.[15] Thus any entity defined as

[10] Ibid.
[11] *Cromartie v. City of St. Petersburg*. 840 So.2d 372 (Fla. 1st DCA 2003).
[12] Section 440.093, F.S. (2003).
[13] Section 440.02(16)(a), F.S. (2003).
[14] Section 440.02(16)(a), F.S. (2002).
[15] Sections 440.09(1) and 440.10(1)(a), F.S. (2003).

an "employer" by the statute is required to provide workers' compensation coverage to its employees. Employee leasing companies were already required by another statute to provide coverage prior to the new act, but the specific addition of employment agencies is a new development in Florida workers' compensation law.[16]

It appears that this change is unlikely to affect most temporary employment agencies, but its full impact is unclear and it could adversely impact some employment placement agencies which refer or place applicants for employment. Staff was unable to find case law on this subject, but most temporary employment agencies were considered to have met the criteria of being an "employer" under the prior law, according to sources interviewed. Most temporary employment agencies exercise sufficient control over the employees that they send out to client employers to be considered the employer of their workers for purposes of the workers' compensation statutes. Representatives from major national employment agencies, Manpower and Kelly Services, indicate that their companies provide workers' compensation insurance for the employees they send to client-employers. Representatives from the National Council on Compensation Insurance also stated that generally temporary employment agencies are the named employers on workers' compensation policies.

Nurse registries are also potentially affected by the definitional change of employer. Apparently, the issue of whether nurse registries were required to provide workers' compensation was not clear and could depend on the facts of each case. This question would have been answered by determining whether or not the nurses were independent contractors, rather than employees, under the criteria specified in statute.[17] Note that for purposes of state licensure, "nurse registries" are defined in s. 400.462(15), F.S., as "any person that procures ...health-care-related contracts for registered nurses ..., who are compensated by fees as independent contractors ..." But at least one recent determination by the Division of Workers' Compensation was that nurse registries did not meet the independent contractor criteria.[18] Under the new act, a nurse registry may be deemed to be an "employment agency" or other "similar agent that supplies employees to other employers" within the definition of an employer required to provide workers' compensation coverage.

In 1997, the Federal Office of Management and Budget adopted the North American Industry Classification System (NAICS) as the standard industry classifications used by statistical agencies of the United States, such as the Census Bureau. The NAICS has three distinct classifications for *employment placement agencies*, *temporary help services*, and *professional employer organizations*, respectively, with definitions and examples of each. It is noteworthy that the NAICS defines *employment placement agency* as establishments primarily engaged in listing employment vacancies and in referring or placing applicants for employment, and that the individuals referred are *not employees* of the employment agencies. Specific examples include nurse registries, model registries, maid registries, babysitting bureaus or registries, casting agencies, etc., as well as "employment agencies." In contrast, *temporary help services* are defined as establishments primarily engaged in supplying workers to clients' businesses for limited periods of time to supplement the working force of the client, and that the individuals

[16] Sections 468.520(4) and 468.529, F.S. (2003); also see, s. 440.11(2), F.S. (2003).
[17] Section 440.02(15)(d), F.S. (2003).
[18] Letter of October 10, 2002 from Tanner Holloman, Director, Div. of Workers' Comp., to Carol Rakoff, President, Total HealthCare Services.

provided *are employees* of the temporary help service establishment. Examples here include manpower pools, model supply services, office help supply services, temporary help services, etc.[19] These classifications indicate the various nature of employment agencies and that imposing a workers' compensation requirement on all such agencies may not be appropriate. This potential impact of the change in the law is that if an entity is considered an "employment agency" or "similar agent who provides employees to other persons" it may no longer be relevant whether the independent contractor criteria are met. But outside of the construction industry, there did not appear to be significant problems with employment agencies. The construction industry was directly addressed in the new act by requiring independent contractors and sole proprietors in the construction industry to obtain workers' compensation.[20]

Other Issues Noted in Senate Bill 50-A

Senate Bill 50-A contained certain provisions that are technically inconsistent or that might require clarification. The Interim Project recommended that the Legislature may want to consider addressing certain technical glitches contained in Senate Bill 50-A, particularly if such glitches are compromising the implementation of the law or are resulting in unintended consequences. These issues are addressed below.

Definition of "Employee;" Volunteers

Under both the prior law and the act, the definition of employee excludes a volunteer, except for a volunteer worker for the state or other governmental entities.[21] As a result, state and local governments have been required to obtain coverage for volunteer employees. Although this provision was not amended by Senate Bill 50-A, the definition of "employee" was amended to mean any person *who receives remuneration* from an employer for the performance of any work or service.[22] As a result, persons volunteering to work for governmental entities may no longer be considered employees and may not be entitled to workers' compensation coverage. This statutory change could also expose a governmental entity to tort liability in the event of an injury, since workers' compensation would no longer be the exclusive remedy.

Exemptions for Limited Liability Companies

Senate Bill 50-A substantially revised and limited exemptions from coverage in the construction industry to no more than three corporate officers, each owning at least a 10 percent stock ownership. Then, in Special Session E, legislation additionally allowed exemptions in the construction industry for no more than three members of a limited liability company each having at least a 10 percent ownership interest.[23] However, additional conforming changes are necessary to ch. 440, F.S., to require members of a limited liability company to meet the same coverage and exemption requirements.

[19] The 2002 NAICS Definitions (561310 employment placement agencies, and 56320 temporary help services) and information on the NAICS are on the U.S. Census Bureau website at www.census.gov/epcd/www/naics.html.
[20] Section 440.02(15)(c)-(d), F.S. (2003).
[21] Section 440.02(15)(d)6., F.S. (2003).
[22] Section 440.02(15)(a), F.S. (2003).
[23] CS/CS/SB's 14-E and 16-E; ch. 2003-422, L.O.F.

Criminal Penalties for Insurance Fraud

Senate Bill 50-A provided several other measures designed to fight fraud and increase prosecution of fraud in the workers' compensation system, as follows:

- Provided that any person who violates a stop-work order commits a first-degree misdemeanor under s. 440.105(2)(a)4., F.S.;
- Provided that any person who knowingly violates a stop-work order commits insurance fraud under s. 440.105(4)(f), F.S.;
- Authorized the Division of Unemployment Compensation to release information in certain circumstances concerning an employee's wages to determine if an injured worker is employed and receiving workers' compensation benefits; and
- Incorporated certain violations of ch. 440, F.S., in the Offense Severity Ranking Chart which would assist in the prosecution and sentencing of workers' compensation fraud by establishing ranking for these violations.

Representatives of the Division of Insurance Fraud of the Department of Financial Services have suggested that the stop-work order violation provisions should be revised to eliminate the misdemeanor provision, since a misdemeanor would less likely be prosecuted. The felony penalty provision would remain for a *knowing* violation of a stop-work order, which is the crime that is more likely to be prosecuted. Senate Bill 50-A created additional criminal penalties for violations relating to workers' compensation fraud. However, certain violations were omitted from the Offense Severity Ranking Chart, which appears to be inadvertent. This chart is used for establishing minimum sentencing guidelines.

Access to Unemployment Compensation Records

The act authorized the Division of Unemployment Compensation to release information to a carrier paying workers' compensation if the carrier has the authorization of either the employee or the employer paying the wages.[24] This provision would assist an insurer in determining if an injured worker is employed and receiving wages. However, the act omitted a related provision, included in a prior 2003 workers' compensation bill (CS/CS/SB 1132), which would require that as a condition of receiving compensation, an injured employee must execute a waiver authorizing the carrier to obtain such information from the Agency for Workforce Innovation which currently administers the unemployment compensation program.[25]

Medical Practice Parameters

The act if the practice parameters and protocols mandated under ch. 440, F.S., must be the practice parameters and protocols adopted by the U.S. Agency for Healthcare Research and Quality (AHRQ) in effect January 1, 2003.[26] However, the AHRQ no longer develops and adopts practice parameters. Instead, the AHRQ and the U.S. Department of Health and Human Services, in partnership with the American Medical Association and the American Association of Health

[24] Section 443.1715, F.S. (2003).
[25] 2003 Regular Session.
[26] Section 440.13(15), F.S. (2003).

Plans, sponsors the National Guideline Clearinghouse, a public resource for evidence-based clinical practice guidelines.

Permanent Total Disability

In revising the eligibility requirements for permanent total disability benefits, the act deleted the definition of *catastrophic injury* previously contained in s. 440.02(37), F.S. (2002), and instead, delineated the specific injuries formerly under the definition in s. 440.15(1)(b), F.S. (2003). The term *catastrophic injury* is no longer defined but a reference to this term remains in a provision that states, "Only claimants with catastrophic injuries or claimants who are incapable of engaging in employment, as described in this paragraph, are eligible for permanent total benefits." Although the term is likely to be read to merely refer to the specified injuries listed in that paragraph, it may cause confusion.

Valuation of Attendant Care by a Family Member

The act revised the method for valuing nonprofessional attendant care provided by a family member to address the situation where the family member remains employed.[27] The new act adds two provisions regarding a family member who remains employed, but the scenarios do not appear to be mutually exclusive and may conflict. First, it provides that if a family member *is employed and is providing attendant care services during hours that he or she is not engaged in employment*, the per-hour value equals the federal minimum hourly wage. However, it further provides that if the family member *remains employed while providing attendant care*, the value equals the per-hour value of the family member's employment, not to exceed the per-hour value of such care available in the community at large.

Dual Roles of DFS and OIR to Audit, Examine and Investigate Carriers

Both the Department of Financial Services (DFS) and the Office of Insurance Regulation (OIR) are provided overlapping authority in ch. 440, F.S., relating to audits, examinations, and investigations of carriers. The DFS, headed by the Chief Financial Officer, is the agency primarily responsible for enforcing the workers' compensation act, while OIR, headed by the Director of Insurance Regulation, is the agency responsible for regulation of insurers. This was first addressed by legislation enacted in the 2003 Regular Session which conformed statutory authority to the reorganization of the former Department of Insurance.[28] In Special Session A, Senate Bill 50-A made further changes related to each agency's oversight of workers' compensation insurers. Additional changes may be needed to more clearly distinguish their respective powers and to delete redundant provisions.

The general intent has been to authorize the DFS to monitor workers' compensation carriers for compliance with the workers compensation act. Responsibilities of the DFS include determining if benefits and medical bills are timely and accurately paid and imposing fines on carriers for non-compliance. It is also intended that OIR have regulatory power to conduct market conduct

[27] Section 440.13(2), F.S. (2003).
[28] CS/CS/SB 1712; ch. 2003-261, L.O.F.

examinations of all insurers, including workers' compensation insurers, for compliance with all insurance laws, and to fine carriers for violations.

The authority for DFS to monitor, examine, investigate, and penalize carriers for compliance, such as timeliness and accuracy of payments, is provided in four different provisions.[29] However, these provisions are redundant and, in some cases, inconsistent. The standards and penalties for late payment of medical bills are particularly confusing, due to different provisions on this same subject. Also, references to the authority for OIR to conduct market conduct examinations under s. 624.3161, F.S., appear to be redundant to the provisions of that section.

III. Effect of Proposed Changes:

Section 1 amends s. 440.02, F.S., to revise the definitions of *employee* and *employer* and provides technical and conforming changes to provisions relating to exemption from coverage requirements for members of a limited liability company engaged in the construction industry.

The definition of *employee* is revised to specifically include volunteer workers for the state and local governmental entities to ensure that such volunteers are eligible for worker's compensation coverage. This change is in response to an amendment to the definition of employee which required an employee to receive remuneration which would conceivably exclude such volunteers.

The definition of *employee* is also revised to allow a member of a limited liability company that is not engaged in the construction industry to elect to be included in the definition of an employee by filing a notice as provided in s. 440.05, F.S. If this election is not made, the member would be exempt from workers' compensation coverage requirements. This change would codify the Division of Workers' Compensation present practice that allows such members to opt-in for coverage. The current exemption eligibility requirements in ch. 440, F.S., relating to members of a limited liability company that are not engaged in the construction industry do not address members of a limited liability company.

The definition of *employer* is amended to delete the 2003 change which specifically included employee leasing companies, employment agencies, and similar agents that provide employees to other persons since the full impact of this change is unclear and could adversely impact some employment placement agencies which refer or place applicants for employment (as more fully explained in Present Situation, above.)

Sections 2 and 3 amend ss. 440.05 and 440.077, F.S., to provide technical and conforming changes to provisions relating to exemption from coverage requirements for members of a limited liability company engaged in the construction industry. For purposes of documenting a 10 percent interest in a limited liability company and obtaining an exemption from coverage, section 2 allows members of a limited liability company engaged in the construction industry to provide such proof by submitting a certificate of membership.

[29] Sections 440.13(11)(b), 440.20(6)(b), 440.20(8)(b), 440.20(15), and 440.525, F.S.

Section 4 amends s. 440.093, F.S., to provide exceptions to the requirement that a mental or nervous injury is compensable only if an accompanying physical injury requiring medical treatment occurs. These exceptions would include instances of sexual battery or robbery arising out of and in the course of employment.

Section 5 amends s. 440.105, F.S., to eliminate two criminal provisions relating to employees using false evidence of identity. The section deletes the provision which provides that it is a felony and insurance fraud for a person to present false identification as evidence of identity for the purpose of obtaining employment; and deletes the related provision that it is a misdemeanor for an employer to knowingly participate in the creation of the employment relationship in which the employee has used any false, fraudulent, or misleading oral or written statement as evidence of identity.

The section also deletes the provision that makes it a misdemeanor for violating a stop-work order while retaining the felony penalty provision for a knowing violation of a stop-work order since the Division of Insurance Fraud has indicated that a misdemeanor would not likely be prosecuted.

The section requires that as a condition of receiving compensation, an employee must execute a waiver authorizing the carrier to obtain wage information from the Agency for Workforce Innovation to determine whether an injured worker is employed and concurrently receiving workers' compensation benefits. Senate Bill 50-A authorized the release of this information to carriers if the carrier has the authorization of either the employee or the employer. However, the act omitted the provision which would require the employee to authorize the release of the information as a condition of receiving compensation.

Section 6 amends s. 440.106, F.S., relating to the reporting of contractors violating ch. 440, FS., to remove a reference to the Office of Insurance Regulation since the Office does not have any jurisdiction relating to compliance and enforcement of coverage requirements.

Section 7 amends s. 440.107, F.S., to provide technical and conforming changes relating to compliance with coverage requirements for members of a limited liability company.

Section 8 amends s. 440.13, F.S., to delete a conflicting penalty provision relating to the untimely payment of medical bills [s. 440.13(11)(b), F.S.] and to revise practice parameters [s. 440.13(15), F.S.] applicable under ch. 440, F.S. The Division of Workers' Compensation has indicated that another provision s. 440.20(6), F.S., is used as their statutory authority for penalizing carriers for the late payment of medical bills. A provision also contained in s. 440.13(11)(b), F.S., relating to requiring a medical-bill review program under certain circumstances is transferred to s. 440.20(6), F.S. (See Section 11, below.)

Section 9 amends s. 440.14, F.S., to provide a technical change to correct a cross-reference.

Section 10 amends s. 440.15, F.S., to delete a reference to the term, *catastrophic injury*, which is no longer used in ch. 440, F.S., to determine eligibility for permanent total disability. The section also revises s. 440.15(1)(e), F.S., to provide vocational evaluations or testing pursuant to s. 440.491, F.S, rather than by "an employer's or carrier's rehabilitation provider or adviser."

The term, "rehabilitation provider or adviser" is not defined in s. 440.491, F.S. This change reinserts the law prior to Senate Bill 50-A.

Section 11 amends s. 440.20, F.S., to replace references to the Office of Insurance Regulation with the Department of Financial Services (department) and to authorize the department to require carriers to implement a medical-bill review program if certain criteria are met. The authority to implement a medical-bill review program is transferred from s. 440.13(11)(b), F.S. (See section 8 above.) Other provisions in s. 440.20, F.S., relating to examinations and investigations, are deleted since the Division has indicated that s. 440.525, F.S., is used as the primary authority for examinations and investigations. Certain provisions relating to examination of claims files and the prohibition against recouping penalties assessed are transferred to s. 440.525, F.S. (See section 13 below.)

Section 12 amends s. 440.381, F.S., to delete a criminal offense and penalty provision that overlaps with another offense and penalty provision under the Workers' Compensation Law. Section 440.381, F.S., provides that it is a third degree felony to submit an application for coverage that contains false, incomplete, or misleading information for the purpose of avoiding or reducing premiums. There is no explicit requirement that the offender know that the submitted information is false. Section 440.105(4)(b), F.S., provides that it is insurance fraud to knowingly misrepresent material information for the purpose of avoiding or reducing the amount of premium. A violation of $20,000 or less is a third-degree felony, a violation of more than $20,000 and less than $100,000 is a second-degree felony, and a violation of greater than $100,000 is a first degree felony.

In order to prosecute the existing offense under s. 440.381, F.S., the application with false information must have included a notice that providing false information is a third-degree felony. Deletion of the offense removes the link between this requirement and proof of the offense, and the remaining language can be interpreted to require that the notice be included in the application form prescribed by the Financial Services Commission. In addition, the wording of the notice is amended to refer to all felony levels. Since the penalty for insurance fraud is contingent upon the monetary value of the violation, specific reference to a third-degree felony would be misleading.

Section 13 amends s. 440.525, F.S., to provide a technical conforming change to reflect the division's jurisdiction as it relates to the scope of examinations under s. 440.525, F.S., to include s. 440.20, F.S., relating to payments of benefits and medical bills. The reference to the term, *office*, is deleted and replaced with the term, *department*, to reflect that the provisions under this section within ch. 440, F.S., are under the jurisdiction of the Department of Financial Services, rather than the Office of Insurance Regulation. A provision contained in s. 440.20(15), F.S., is transferred to this section to provide that the scope of the Division's investigations and examinations includes an examination of claim files to determine whether there is questionable claims handling practices or a pattern of unreasonably controverted claims. Subsection (16) of s. 440.20, F.S., is transferred to this section to provide that no penalty assessed under s. 440.525, F.S., can be recouped by the carrier in the rate base, the premium, or any rate filing and the Office of Insurance Regulation would enforce this provision. (See section 11 above.)

Section 14 amends s. 921.0022, F.S., to incorporate felony violations under s. 440.105(4), F.S., in the Offense Severity Ranking Chart for purposes of prosecuting workers' compensation fraud. These violations are currently unranked, defaulting them to the lowest level offense ranking. The amendment ranks the offenses as follows:

Monetary value of offense	Level of felony	Offense Severity Ranking
Less than $20,000	3rd degree	Level 3
$20,000 or more, but less than $100,000	2nd degree	Level 5
$100,000 or more	1st degree	Level 7

By comparison, other offenses under Chapter 440 are second-degree felonies ranked at Offense Level 5.

Section 15 provides that this act takes effect upon becoming a law.

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:

Illegal aliens and other persons that misrepresent their identity to obtain employment would no longer be subject to the criminal penalty provision of insurance fraud, under s. 440.105, F.S., and subsequently denied benefits, if injured, due to misrepresenting their identity. Employers would no longer be subject to the provision which made it a misdemeanor for an employer to knowingly participate in the creation of the employment relationship in which an employee has used any false, fraudulent, or misleading oral or written statement as evidence of identity. However, other state and federal laws would continue to address such violations.

An exception for the physical injury requirement for the compensability of mental stress or injury in instances of certain violent crimes would allow employees to obtain workers' compensation benefits for mental stress or injury that occurs in instances of sexual battery or robbery arising out of and in the course of employment that are not accompanied by a physical injury.

Fewer disputes should occur regarding the payment for attendant care provided by employed family members as a result of eliminating the conflicting methods for the valuation of such attendant care.

The provision requiring an employee to execute a waiver authorizing the release of wage information from the state would assist the carrier in determining if an employee is employed and concurrently receiving workers' compensation benefits.

NCCI's Summary and Analysis of Proposed Changes in Florida's SB 2268

The following analysis of the bill was provided to staff by the National Council on Compensation Insurance:

While the proposed changes clarify and adjust a number of aspects of the workers compensation system in Florida, they are not expected to have a significant impact on overall system costs.

The main proposals in the bill are:

- *Allow compensability for mental or nervous injury without accompanying physical injury that result from sexual battery or robbery and arise out of and in the course of employment. Alternatively, by amendment, allow compensability, limited to six months, for mental or nervous injury without accompanying physical injury that result from sexual battery or robbery and arise out of and in the course of employment.*

This provision would allow compensability for a limited, additional number of claimants, which, if unlimited by a period of time, could increase total system costs. Based on DCI data, less than 0.1% of costs result from mental injuries without accompanying physical injuries. A smaller portion of this cost would represent claims resulting from sexual battery or robbery. If limited to six months, this provision would result in a negligible increase on total system costs.

- *Adopt practice parameters and protocols of the National Guideline Clearinghouse, as of May 1, 2004, applicable to medical care.*

We have looked at the effectiveness of practice parameters in workers compensation in other states. Given the uncertainty surrounding the effectiveness and application of such parameters and protocols, any efficiency gained or additional costs would be reflected in subsequent experience. Practice parameters and protocols typically reflect best practices

(i.e. the way that medicine is already being practiced). Therefore, we would not expect dramatic changes from the current practice.

- *Revisions to definitions of "Employee" and "Employer"*

Strikes "employment agencies, employee leasing companies, and similar agents that supply employees to other persons" from the definition of "employer." Since these entities are already required to provide workers compensation coverage under s. 468.529 and other sections of the Florida statutes, this change is not expected to expand the list of entities eligible for workers compensation exemptions or impact workers compensation costs.

- *Allowing members of a limited liability company to elect exemption from workers' compensation coverage, to resolve an inconsistency between Special Session E and SB 50A.*

Specifically adding volunteer workers for governmental entities as employees entitled to workers compensation. This was due to an addition to the definition of "employee" under SB 50A requiring a person to receive remuneration from the employer in order for that person to be considered an employee.

Because of the extreme level of uncertainty regarding the impact that the above proposals will have, NCCI is unable to attribute any potential savings or costs for the above proposals in the overall estimated impact of the bill. Actual savings or costs, if any, that are achieved will be reflected in the experience as it is incorporated into future rate filings.

Other provisions in the bill:

- *Strikes two provisions in the statutes that made it unlawful for illegal aliens to be fraudulently employed. This would revert to the statutes in effect prior to SB 50A, which became effective 10/1/03. This provision is expected to affect very few claims and, therefore, have a negligible impact on overall costs.*

- *Deleting the term "catastrophic injury" from the definition of Permanent Total, since the definition for this term was removed under SB 50A. This clarifies the legislative intent underlying SB 50A.*

- *Resolving the two conflicting valuations for attendant care provided by an employed family member, which was added under SB 50A, by removing one of the valuation methods.*

- *Consolidating various provisions for auditing, investigating and sanctioning carriers by the Department of Financial Services, in order to eliminate redundancies and inconsistencies.*

The above additional proposals are expected to have a negligible impact on total system costs.

C. Government Sector Impact:

By amending the definition of employee to specify the inclusion of volunteers of state and local governments, such volunteers would clearly be deemed employees for purposes of workers' compensation coverage and eligible for medical and indemnity benefits in the event an injury occurred during such volunteer work. Without such a clarification, a governmental entity could be exposed to tort liability in the event of an injury, since workers' compensation would no longer be the exclusive remedy.

The incorporation of certain felony violations of ch. 440, F.S., in the Offense Severity Ranking Chart will assist in the prosecution and sentencing of workers' compensation fraud by establishing ranking for these violations.

VI. Technical Deficiencies:

None, except as corrected by amendments #1 and #2.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Criminal Justice:
This amendment corrects a technical deficiency in the bill by deleting the addition of new language to s. 440.02(15)(b)3, F.S. It specifies that members of a limited liability company not engaged in the construction industry are not covered by workers' compensation, unless they elect to opt for such coverage. This amendment conforms the subparagraph to other provisions of the bill and codifies what has always been the interpretation of the current law that applies to partners in a partnership (not engaged in the construction industry) who are not covered by workers' compensation unless they elect to be covered.

#2 by Criminal Justice:
This amendment corrects a technical deficiency in the bill by deleting the addition of new language to s. 440.02(15)(d)7, F.S., relating to members of a limited liability company. This amendment is consistent with Amendment #1.

#3 by Criminal Justice:
This amendment corrects an error in the Criminal Punishment Code Offense Severity Ranking Chart, s. 921.0012(3)(c), F.S., by removing the listing for s. 440.105(3)(b), F.S. This offense is a misdemeanor and was erroneously included in the felony ranking chart.