

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Committee on Appropriations

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BILL: PCS/SB 444 (314816)

INTRODUCER: Appropriations Committee (Recommended by Appropriations Subcommittee on General Government); and Senator Galvano

SUBJECT: Workers' Compensation

DATE: April 21, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Knudson</u>	<u>BI</u>	<u>Favorable</u>
2.	<u>Betta</u>	<u>DeLoach</u>	<u>AGG</u>	<u>Fav/CS</u>
3.	<u>Betta</u>	<u>Kynoch</u>	<u>AP</u>	<u>Pre-meeting</u>

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

PCS/SB 444 amends provisions related to stop work orders (SWO) and associated penalties relating to Florida's Workers' Compensation Law as follows:

- Extends the number of days for an employer to provide requested records to the Department of Financial Services (DFS) from five to 10 days or be subject to a SWO.
- Authorizes the DFS to issue an order of conditional release from a SWO to an employer that has secured appropriate coverage if the employer pays \$1,000 as a down payment and agrees to pay the remainder of the penalty in periodic installments or to pay the remaining penalty in full.
- Authorizes an immediate reinstatement of the SWO if the employer does not pay the full penalty or enter into a payment agreement within 28 days after service of the SWO upon the employer.
- Repeals a required employer reporting requirement for a probationary period.
- Credits the initial payment of the premium made by the employer to secure coverage against the assessed penalty for not having coverage for an employer that has not previously been issued a SWO. The bill provides a minimum \$1,000 penalty if the calculated penalty, after the credit is applied, is less than \$1,000.
- Revises the penalty for failing to have required coverage. The bill reduces the look-back period for failure to comply with coverage requirements from three to two years and increases the penalty multiplier from 1.5 to two times the amount of unpaid premiums.

The bill codifies a recent court decision regarding the calculation of workers' compensation indemnity benefits to allow the payment of such benefits at either 66.67 percent or the current 66 2/3 percent of the employee's average weekly wage; this change has no fiscal impact because it reflects current procedures used by carriers. The remaining provisions of the bill are expected to have a negligible fiscal impact.

The bill also changes the assessment calculation for the Workers' Compensation Special Disability Trust Fund and requires it be calculated by the DFS based upon the net premiums written by carriers, the amount of premiums calculated by the department for self-insured employers, and the anticipated balance and expenses of the trust fund. The assessment rate cap is changed from 4.52 percent to 2.50 percent.

## II. Present Situation:

### Coverage Requirements

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

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

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

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<sup>1</sup> Section 440.38, F.S.

<sup>2</sup> Section 440.02(17)(b)2, F.S.

<sup>3</sup> *Id.*

<sup>4</sup> Section 440.05, F.S.

<sup>5</sup> *Id.*

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

## **Enforcement of Coverage Requirements**

If an employer fails to comply with workers' compensation coverage requirements, the DFS must issue a stop-work order (SWO) within 72 hours of determining noncompliance.<sup>7</sup> The SWO requires the employer to cease all business operations. The SWO remains in effect until the employer secures appropriate coverage and the DFS issues an order releasing the SWO (for employers that have paid the assessed penalty); or an order of conditional release (for employers that have agreed to pay the penalty in installments pursuant to a payment agreement schedule with the DFS). Additionally, employers are assessed a penalty equal to 1.5 times what the employer would have paid in workers' compensation premiums for all periods of non-compliance during the preceding three-year period or \$1,000, whichever is greater. Thus, for penalty calculation purposes, the employer must provide three years of business records. Some employers are often unable to quickly provide all records required to calculate the penalty. The SWO remains in effect and the employer cannot conduct business until the DFS has calculated the penalty.

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

## **Workers' Compensation Indemnity Benefits**

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

In a 2013 case, an employer had calculated the compensation rate for a claimant by multiplying the AWW by .66667 (or \$529.48). The Judge of Compensation Claims (JCC) calculated the compensation rate by multiplying the AWW by .6667 (or \$529.50). On appeal, the First District Court of Appeal held that "[b]ecause the [e]mployer did not pay less than the compensation required by statute, the JCC erred in ordering the employer to pay more [ ]" than 66 2/3 percent of the AWW, namely \$529.47.<sup>11</sup>

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<sup>7</sup> Section 440.107, F.S.

<sup>8</sup> *Id.*

<sup>9</sup> Section 440.12(1), F.S.

<sup>10</sup> Section 440.15, F.S.

<sup>11</sup> *Escambia County School District v. Vickery-Orso*, 109 So. 3d 1242, 1244 (Fla 1st DCA 2013).

## **Workers' Compensation Special Disability Trust Fund**

The Florida Special Disability Trust Fund (SDTF) was established to encourage the employment of workers with pre-existing permanent physical impairments. The SDTF reimburses employers (or their carriers) for the excess in workers' compensation benefits provided to an employee with a pre-existing impairment who is subsequently injured in a workers' compensation accident. As part of the reimbursement process, the SDTF determines whether claims are eligible to receive reimbursements, as well as audits and processes reimbursement requests. Reimbursement under the SDTF is not available for injuries occurring on or after January 1, 1998. The SDTF is maintained by annual assessments on insurers providing compensation insurance coverage. Claims with an accident date before 1998 are still eligible to seek reimbursements. After a claim has been accepted, a request for reimbursement of additional expenses may be submitted annually.

The assessment rate is calculated by the DFS using the previous three calendar years of SDTF expenditures. Currently, the assessment rate must produce an amount equal to the average of the sum of disbursements during the immediate past three calendar years and two times the disbursements of the most recent calendar year. The assessment rate is capped at 4.52 percent of net premiums.

### **III. Effect of Proposed Changes:**

#### **Enforcement of Coverage Requirements**

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

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

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

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

\$1,000 penalty against an employer if the calculated penalty, after the credit is applied, is less than \$1,000.

### **Calculation of Compensation**

The bill addresses the holdings in *Escambia County School District v. Vickery-Orso, supra*, by authorizing employers/carriers to pay compensation to injured employees of “66 2/3 or 66.67 percent” of the AWW. The latter percentage produces a slightly higher compensation rate for injured employees and removes the need for employers/carriers that have been paying benefits at 66.67 percent of the AWW to incur costs associated with modifying their payment procedures.

### **Workers’ Compensation Special Disability Trust Fund**

The bill changes the assessment calculation for the Workers’ Compensation Special Disability Trust Fund and requires it be calculated by the DFS based upon the net premiums written by carriers, the amount of premiums calculated by the department for self-insured employers, and the anticipated balance and expenses of the trust fund. The assessment rate cap is changed from 4.52 percent to 2.50 percent.

The bill is effective July 1, 2014.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

### **B. Public Records/Open Meetings Issues:**

None.

### **C. Trust Funds Restrictions:**

None.

## **V. Fiscal Impact Statement:**

### **A. Tax/Fee Issues:**

None.

### **B. Private Sector Impact:**

PCS/SB 444 allows employers five additional days to produce records requested by the DFS before the issuance of a SWO.

The bill revises the employer penalty for not having coverage by reducing the look-back period from the preceding three years to two years for purposes of calculating the

penalty; however, it increases the penalty multiplier from 1.5 to two times the amount an employer would have paid in premium.

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

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

The DFS states the changing of the assessment calculation will benefit the private sector by allowing the department to draw down the SDTF fund balance to pay approved older reimbursement requests that are awaiting payment without increasing the SDTF assessment rate. Reducing the cap from 4.52 percent to 2.5 percent lowers the maximum assessment for employers.

**C. Government Sector Impact:**

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

Since the program is closed and the assessment rate is lower than 2.5 percent, reducing the assessment cap from 4.52 percent to 2.5 percent has no impact to the trust fund.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

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

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

<sup>13</sup> *Id.*

**IX. Additional Information:**

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

**Recommended CS by Appropriations Subcommittee on General Government on February 6, 2014:**

- Changes the assessment calculation for the Workers' Compensation Special Disability Trust Fund to be calculated by the DFS based upon the net premiums written by carriers, the amount of premiums calculated by the department for self-insured employers, and the anticipated balance and expenses of the trust fund.
- Changes the assessment rate cap is from 4.52 percent to 2.50 percent.

- B. **Amendments:**

None.