

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7073 PCB RORS 16-01 Ratification of Rules/Florida Workers' Compensation Health Care Provider Reimbursement Manual/Department of Financial Services

SPONSOR(S): Rulemaking Oversight & Repeal Subcommittee; Ray

TIED BILLS: **IDEN./SIM. BILLS:** SB 1402

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rulemaking Oversight & Repeal Subcommittee	11 Y, 0 N	Stranburg	Rubottom
1) Government Operations Appropriations Subcommittee	12 Y, 0 N	Keith	Topp
2) Regulatory Affairs Committee	13 Y, 0 N	Lloyd	Hamon

SUMMARY ANALYSIS

Florida's workers' compensation law requires that the provider reimbursement manuals setting maximum reimbursement rates for medical services must be updated every three years. For a variety of reasons, including the Legislature not ratifying the 2011 Edition of the Florida Workers' Compensation Health Care Provider Reimbursement Manual over multiple sessions, the 2008 Edition is currently in effect.

Since the 2015 Legislature adjourned, the Department of Financial Services (DFS) has adopted amendments to the rule incorporating by reference the Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2015 Edition (2015 Edition). The 2015 Edition sets out the policies, guidelines, codes, and maximum reimbursement allowances for services and supplies furnished by health care providers under the workers' compensation statutes. The 2015 Edition adopted as part of Rule 69L-7.020, F.A.C., *Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2015 Edition* (Rule), on July 16, 2015, and submitted for ratification on November 3, 2015.

The Statement of Estimated Regulatory Costs developed in conjunction with the Rule shows that it has a specific, adverse economic effect, or increases regulatory costs, exceeding \$1 million over the first 5 years the rule is in effect. Accordingly, the Rule must be ratified by the Legislature before it may go into effect. The bill ratifies the Rule. The scope of the bill is limited to this rulemaking condition and does not adopt the substance of any rule into the statutes.

The bill will have a significant negative fiscal impact to state expenditures from the State Risk Management Trust Fund (SRMTF) within the DFS. The DFS Division of Risk Management (division) estimates an increase in workers' compensation expenses for the division by \$2.1 million in FY 2016-17, \$2.1 million in FY 2017-18, and \$2.2 million in FY 2018-19. However, the projected fiscal year-end balances of the SRMTF (including the impact of HB 7073) will be positive in FY 2016-17 and FY 2017-18, but a negative balance of (\$17.4) million in FY 2018-19. Without ratification of the manual, the cash balance would be (\$11.0) million in FY 2018-19.

The impact to local government and the private sector is indeterminate. However, local governments and private employers responsible for paying workers' compensation claims or obtaining workers' compensation insurance will incur increased costs due to the increase in the maximum reimbursements for providers.

The bill is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Florida's Workers' Compensation Law¹ requires employers to provide injured employees all medically necessary remedial treatment, care, and attendance for such period as the nature of the injury or the process of recovery may require.² The Department of Financial Services, Division of Workers' Compensation (DFS), provides regulatory oversight of Florida's workers' compensation system, including the workers' compensation health care delivery system. The law specifies certain reimbursement formulas and methodologies to compensate workers' compensation health care providers³ that provide medical services to injured employees. Where a reimbursement amount or methodology is not specifically included in statute, the Three-Member Panel is authorized to annually adopt statewide schedules of maximum reimbursement allowances (MRAs) to provide uniform fee schedules for the reimbursement of various medical services.⁴ DFS incorporates the MRAs approved by the Three-Member Panel in reimbursement manuals⁵ through the rulemaking process provided by the Administrative Procedures Act.⁶

The Three-Member Panel

The Three-Member Panel is created by statute to adopt MRAs and report on and make recommendations regarding the state of the workers' compensation health care delivery system.⁷ The panel is made up of the Chief Financial Officer, or the Chief Financial Officer's designee, and two members appointed by the Governor. The Governor's appointees are subject to confirmation by the Senate. One of the Governor's appointees is a representative of employers, while the other is a representative of employees.⁸ The Three-Member Panel has approved three sets of MRAs. The MRAs establish the expected reimbursement amounts for medical services rendered by individual health care providers, hospitals, and ambulatory surgical centers. The Three-Member Panel does not have rulemaking authority. The DFS is charged with providing administrative support to the Three-Member Panel and implements the Three-Member Panel's MRA approvals through its rules. The Three-Member Panel holds publicly noticed open meetings to implement their duties and obligations.

Reimbursement Manuals

The DFS periodically adopts rules implementing the administrative policies and procedures that govern the provision, billing, and reimbursement of medical services in the workers' compensation health care delivery system. There are three reimbursement manuals adopted by the DFS. They are the *Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2008 Edition*;⁹ the *Florida Workers' Compensation Reimbursement Manual for Ambulatory Surgical Centers, 2015 Edition*;¹⁰ and, the *Florida Workers' Compensation Reimbursement Manual for Hospitals, 2014 Edition*.¹¹ The DFS has rulemaking authority to develop the reimbursement manuals. The DFS can choose the organization of

¹ Ch. 440, F.S.

² s. 440.13(2)(a), F.S.

³ The term "health care provider" includes a physician or any recognized practitioner licensed to provide skilled services pursuant to a prescription or under the supervision or direction of a physician. It also includes any hospital licensed under chapter 395 and any health care institution licensed under chapter 400 or chapter 429. s. 440.13(1)(g), F.S.

⁴ s. 440.13(12), F.S.

⁵ ss. 440.13(12) and (13), F.S., and Ch. 69L-7, F.A.C.

⁶ Ch. 120, F.S.

⁷ s. 440.13(12), F.S.

⁸ s. 440.13(a), F.S.

⁹ Rule 69L-7.020, F.A.C.

¹⁰ Rule 69L-7.100, F.A.C.

¹¹ Rule 69L-7.501, F.A.C.

their rules and currently incorporates each set of MRAs into the related reimbursement manual as a single document.

Each reimbursement manual incorporates one set of MRAs, along with the DFS' administrative policies and procedures governing the provision, billing, and reimbursement of medical services, and is adopted by reference in a separate rule. The DFS reviews the economic impact of the entire rule to identify whether the legislative ratification threshold is met. While revisions to the DFS administrative policy and procedure portion of the manual may have some financial impact, the Three-Member Panel's revisions to the MRAs are typically the biggest cost driver. This is because the MRAs are the basis for many millions of dollars in reimbursement annually. Accordingly, it only takes a small percentage change to the MRAs to increase costs by \$1 million within the first 5 years of implementation.

In September 2011, the Department adopted Rule 69L-7.020, F.A.C., adopting the 2011 Edition of the Florida Workers' Compensation Health Care Provider Reimbursement Manual. The approved MRAs that were included in the manual were estimated to have an economic impact in excess of the legislative ratification threshold. The rule was not ratified by the Legislature in the 2012, 2013, or 2014 Regular Sessions. In 2013, HB 1165 was filed, to ratify the rule. HB 1165 was not considered and no other bills were filed for this purpose during these sessions. In February 2015, the DFS withdrew the rule development that adopted the 2011 Edition, pending legislative ratification. The DFS also proposed an updated edition, including a new set of MRAs approved by the Three-Member Panel.¹²

On January 22, 2015, the Three-Member Panel approved a revised uniform schedule of MRAs for physicians and other recognized practitioners. DFS initiated rulemaking to adopt the 2015 Edition of the Florida Workers' Compensation Health Care Provider Reimbursement Manual and on July 16, 2015, adopted the amended rule. According to the National Council on Compensation Insurance, the revisions to MRAs in the 2015 Edition will result in increased costs to the overall compensation system of \$64 million over the next five years.¹³

Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.¹⁴ Rulemaking authority is delegated by the Legislature¹⁵ through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"¹⁶ a rule. Agencies do not have discretion whether to engage in rulemaking.¹⁷ To adopt a rule, an agency must have a general grant of authority to implement a specific law by rulemaking.¹⁸ The grant of rulemaking authority itself need not be detailed.¹⁹ The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.²⁰

An agency begins the formal rulemaking process by filing a notice of the proposed rule.²¹ The notice is published by the Department of State in the Florida Administrative Register²² and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated

¹² See Florida Administrative Register, Vol. 41/39, published February 26, 2015, and Vol. 41/21, published February 2, 2015. The Florida Administrative Register is available on the Internet at www.flrules.org.

¹³ Email correspondence with The National Council on Compensation Insurance (Jan. 26, 2016) on file with the Government Operations Appropriations Subcommittee.

¹⁴ s. 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

¹⁵ *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

¹⁶ s. 120.52(17), F.S.

¹⁷ s. 120.54(1)(a), F.S.

¹⁸ ss. 120.52(8) and 120.536(1), F.S.

¹⁹ *Save the Manatee Club, Inc.*, supra at 599.

²⁰ *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

²¹ s. 120.54(3)(a)1., F.S.

²² s. 120.55(1)(b)2., F.S.

regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule's adverse effect on specified aspects of the state's economy or increase in regulatory costs.²³

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period from when the rule goes into effect. First is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.²⁴ Next is the likely adverse impact on business competitiveness,²⁵ productivity, or innovation.²⁶ Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.²⁷ If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed \$1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."²⁸ A rule must be filed for adoption before it may go into effect²⁹ and cannot be filed for adoption until completion of the rulemaking process.³⁰ A rule projected to have a specific economic impact exceeding \$1 million in the aggregate over 5 years³¹ must be ratified by the Legislature before going into effect.³² As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

Impact of Rule

The Rule incorporates by reference the 2015 Edition of the Manual, which provides for reimbursement of health care providers under the increased MRAs approved by the Three-Member Panel.

Effect of Proposed Change

The bill ratifies Rule 69L-7.020, F.A.C., allowing the rule to go into effect.

B. SECTION DIRECTORY:

Section 1: Ratifies Rule 69L-7.020, F.A.C., solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S.; expressly limits ratification to the effectiveness of the rules; directs that the act shall not be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State.

Section 2: Provides the act goes into effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

²³ s. 120.541(2)(a), F.S.

²⁴ s. 120.541(2)(a)1., F.S.

²⁵ Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

²⁶ s. 120.541(2)(a)2., F.S.

²⁷ s. 120.541(2)(a)3., F.S.

²⁸ s. 120.54(3)(e)6., F.S. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.

²⁹ s. 120.54(3)(e)6., F.S.

³⁰ s. 120.54(3)(e), F.S.

³¹ s. 120.541(2)(a), F.S.

³² s. 120.541(3), F.S.

2. Expenditures:

Among other insurance programs, the DFS Division of Risk Management (division) administers the state's workers' compensation self-insurance program. The workers' compensation benefit costs are funded through premiums charged to participating public entities by the division and held by the DFS in the State Risk Management Trust Fund (SRMTF).³³

The division estimates that ratifying the 2015 Edition of the Health Care Provider Reimbursement Manual will increase workers' compensation expenses for the division by \$2.1 million in Fiscal Year 2016-17, \$2.1 million in Fiscal Year 2017-18, and \$2.2 million in Fiscal Year 2018-19.³⁴ However, the projected fiscal year-end balances of the SRMTF (including the impact of HB 7073) will be positive in FY 2016-17 and FY 2017-18, but a negative balance of (\$17.4) million in FY 2018-19. Without ratification of the manual, the cash balance would be (\$11.0) million in FY 2018-19.³⁵

State Risk Management Trust Fund			
	FY 2016-17	FY 2017-18	FY 2018-19
Beginning Balance	61,800,000	26,028,342	6,392,084
Estimated Revenue	193,500,000	193,500,000	193,500,000
TOTAL REVENUE	255,300,000	219,528,342	199,892,084
Estimated Expenditures	(227,200,000)	(211,000,000)	(215,100,000)
Impact of HB 7073	(2,071,658)	(2,136,258)	(2,202,758)
Estimated Year-end Balance	26,028,342	6,392,084	(17,410,674)

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The impact to local government is indeterminate. Local governments who are responsible for paying workers' compensation claims or obtaining workers' compensation insurance will incur increased costs due to the increase in the provider MRAs.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The impact to local government is indeterminate. Local governments who are responsible for paying workers' compensation claims or obtaining workers' compensation insurance will incur increased costs due to the increase in the provider MRAs.

D. FISCAL COMMENTS:

None.

³³ ss. 284.02 and 284.30, F.S.

³⁴ Email correspondence with The Department of Financial Services (Jan. 26, 2016) on file with the Government Operations Appropriations Subcommittee.

³⁵ Prior to considering the application of the effect of the bill, the Revenue Estimating Conference has projected negative cash balance in the SRMTF of (\$10.9) million in FY 2018-19. OFFICE OF ECONOMIC & DEMOGRAPHIC RESEARCH, *Self-Insurance Estimating Conference, Risk Management Trust Fund*, Dec. 21, 2015, <http://edr.state.fl.us/Content/conferences/riskmanagement/index.cfm> (last visited Feb. 12, 2016). The Revenue Estimating Conference's estimate is based on numbers that are rounded differently than the figures provided by staff.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The legislation does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

No other constitutional issues are presented by the bill.

B. RULE-MAKING AUTHORITY:

The bill meets the final statutory requirement for the DFS to exercise its rulemaking authority concerning the periodic adjustment of workers' compensation health care provider reimbursement policies and rates. No additional rulemaking authority is required.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.