

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.)

Prepared By: The Professional Staff of the Appropriations Subcommittee on General Government

BILL: CS/SB 986

INTRODUCER: Banking and Insurance Committee and Senator Simpson

SUBJECT: Workers' Compensation System Administration

DATE: February 16, 2016 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	Fav/CS
2.	Betta	DeLoach	AGG	Recommend: Favorable
3.			AP	

Please see Section IX. for Additional Information:
COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 986 amends regulatory provisions of ch. 440, F.S., the “Workers Compensation Law,” which are administered by the Department of Financial Services (DFS). The bill affects provisions related to compliance and enforcement as follows:

- Creates a 25 percent penalty credit for employers who have not been previously issued a stop-work order or order of penalty assessment for non-compliance with coverage requirements if they maintain required business records and timely respond to the written DFS business records requests.
- Establishes a deadline for employers to file certain documentation to receive a penalty reduction.
- Reduces the imputed payroll multiplier related to penalty calculations from 2 times to 1.5 times the statewide average weekly wage.
- Eliminates a three-day response requirement applicable to employer held exemption documentation.

The bill eliminates fees collected by the DFS relating to new insurer registration and the Special Disability Trust Fund notices of claim and proofs of claim.

The bill revises provisions related to health care services and disputes as follows:

- Removes insurers and employers from the medical reimbursement dispute provision.
- Allows a Judge of Compensation Claims to designate an expert medical advisor of their choosing, rather than only those that are certified by the DFS.

The bill also:

- Eliminates the requirement for employers to notify the DFS by telephone or telegraph within 24 hours of any work related death and instead uses other reporting requirements.
- Eliminates the Preferred Worker Program, which has been inactive for over ten years.
- Allows employers to notify their insurers of their employee's coverage exemption, rather than requiring that a copy of the exemption be provided.

The bill has a negative annual fiscal impact of approximately \$1 million in penalty revenue deposited into the Workers' Compensation Administration Trust Fund and a \$1,500 negative annual fiscal impact to the Special Disability Trust Fund. Both trust funds are within the Department of Financial Services.

The effective date of the bill is October 1, 2016.

II. Present Situation:

Administration of the Workers' Compensation System in Florida

The Division of Workers' Compensation within the DFS is responsible for administering ch. 440, F.S., which includes the enforcement of coverage requirements,¹ administration of workers' compensation health care delivery system,² data collection,³ and assisting injured workers, employers, insurers, and providers in fulfilling their responsibilities under ch. 440, F.S.⁴

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.⁵ Individuals who elect an exemption are not considered "employees," for premium calculation purposes, and are not eligible to receive workers' compensation benefits if they suffer a workplace injury.

Enforcement of Coverage Requirements

Stop Work Orders

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.⁶ 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

¹ Section 440.107(3), F.S.

² Section 440.13, F.S.

³ Section 440.185 and 440.593, F.S.

⁴ Section 440.191, F.S.

⁵ Section 440.38, F.S.

⁶ Section 440.107, F.S.

that have agreed to pay the penalty in installments pursuant to a payment agreement schedule with the DFS).

An SWO is issued for the following violations:

- Failure to obtain workers' compensation insurance;
- Material understatement or concealment of payroll;
- Material misrepresentation or concealment of employee duties to avoid paying the proper premium;
- Material concealment of information pertinent to the calculation of an experience modification factor; and
- Failure to produce business records within ten days of receipt of a written request from the DFS.⁷

Imposition of Payroll for Penalty Purposes

In addition to the SWO, employers are assessed a penalty equal to 2.0 times what the employer would have paid in workers' compensation premiums for all periods of non-compliance during the preceding two-year period or \$1,000, whichever is greater.⁸ The SWO remains in effect and the employer cannot conduct business until the DFS has calculated the penalty imputed based on payroll. Sometimes, an employer will not have the required payroll information or will not comply with the DFS' business records request. Section 440.107(7), F.S., provides a means for the DFS to impute the employer's payroll for penalty purposes.

The imputed payroll under the law is twice the statewide average weekly wage (SAWW)⁹ for each individual that the employer failed to cover. Depending on the circumstances of a particular case, the DFS may have to impute payroll for all of the employees for the entire two-year period or the DFS may only have to impute payroll for a one or more employees for a small portion of the two-year period. It depends upon the quality and availability of the employer's records. When the DFS authority to impute payroll was added to the law in 2003,¹⁰ as one of the deterrents to fight fraud, it was set at 1.5 times the SAWW. It was increased to 2 times the SAWW in 2014. The DFS suggests that this can lead to "exorbitant penalty amounts that do not correlate with the violation committed by the employer."¹¹

Avoiding Work Stoppage and Minimizing Penalties Due to Noncompliance

There are two ways for a non-compliant employer to mitigate the impact of a DFS finding of non-compliance on their business operations. First, if the employer comes into compliance after initiation of an investigation, but before they are ordered to stop work, an SWO is not issued. Instead, if the law requires penalties, the DFS will only levy penalties. In that case, the penalties are levied in an Order of Penalty Assessment (OPA). This permits the employer to avoid work stoppage due to an SWO, while also achieving compliance. This also provides the employer an opportunity to reduce their potential penalty. If the employer has never received an SWO before,

⁷ Section 440.107(7)(d), F.S.

⁸ Section 440.107(7)(d), F.S.

⁹ The statewide average weekly wage is determined by the DFS pursuant to s. 440.12(2), F.S.

¹⁰ Ch. 2003-412, s. 13, Laws of Fla.

¹¹ Email from the Division of Workers' Compensation, Department of Financial Services, (Jan. 6, 2016) (on file with the Senate Committee on Banking and Insurance).

the employer may receive a credit against the penalty equal to the amount of the initial payment of workers' compensation premium resulting from them achieving compliance following the initiation of the DFS investigation.¹²

DFS Compliance and Enforcement Statistics

For Fiscal Year 2014-2015, the DFS issued 2,727 SWOs with approximately \$52.4 million in penalties to employers that violated the coverage requirements.¹³ The DFS imputed payroll against the employer in 1,584 cases.¹⁴ The DFS issued 256 OPAs levying about \$3.1 million in penalties when an employer came into compliance with the coverage requirements prior to the issuance of an SWO. The DFS reports that they are able to collect between 25 percent and 35 percent of the penalties they assess.¹⁵

The DFS maintains an online database of exemption holders.¹⁶ The DFS reports that of the 367 non-construction LLCs that received an SWO in Fiscal Year 2014-2015, 32 corrected their non-compliance because one or more LLC members obtained exemptions.¹⁷ An additional 30 non-construction LLCs achieved compliance by purchasing coverage for four employees.

Medical Reimbursement Disputes

The DFS is responsible for resolving medical reimbursement disputes between health care providers and insurers¹⁸ or employers.¹⁹ Health care providers, insurers, and employers have 45 days from receipt of notice of disallowance or adjustment of payment from an insurer to file a reimbursement dispute petition with the DFS. Insurers have 30 days from receipt of the provider's petition to submit all documentation substantiating the insurer's disallowance or adjustment to the DFS; otherwise they waive all objections to the petition. The DFS has 120 days from receipt of all documentation to issue a written determination. The DFS's determination is subject to the hearing provisions of the Administrative Procedures Act.²⁰

Insurers are required to report all instances of health care provider overutilization to the DFS.²¹ The DFS has implemented rules formalizing the procedure for reporting alleged provider

¹² Section 440.107(7)(d)1., F.S.

¹³ Florida Department of Financial Services, *Division of Workers' Compensation 2015 Results & Accomplishments Report*, at <http://www.myfloridacfo.com/Division/WC/PublicationsFormsManualsReports/Reports/AnnualReportWC2015.pdf>.

¹⁴ Department of Financial Services, Analysis of Senate Bill 986, (Jan. 6, 2016) (on file with Senate Committee on Banking and Insurance).

¹⁵ Department of Financial Services, Analysis of Senate Bill 986, (Jan. 6, 2016) (on file with Senate Committee on Banking and Insurance).

¹⁶ *Division of Workers' Compensation Proof of Coverage Search Page*, <https://apps8.fldfs.com/proofofcoverage/Search.aspx> (last visited Jan. 4, 2016). Filter search by "Exemption Holder Name" or "Exemption Holder SSN."

¹⁷ Email from the Division of Workers' Compensation, Department of Financial Services, (Jan. 5, 2016) (on file with Senate Banking and Insurance Committee).

¹⁸ The terms "carrier" and "insurer" are used interchangeably within the context of the workers' compensation law. In fact, the definition of "insurer" expressly includes the term "carrier." s. 440.02(38), F.S. "Carrier" means any person or fund authorized under s. 440.38 to insure under this chapter and includes a self-insurer, and a commercial self-insurance fund authorized under s. 624.462. s. 440.02(4), F.S. While this analysis uses the term "insurer" in this instance to maintain internal consistency, the portion of the bill described strikes the term "carrier" from statute.

¹⁹ Section 440.13(7), F.S.

²⁰ Ch. 120, F.S.

²¹ Section 440.13(6), F.S.

violations.²² Any interested person can report an alleged provider violation through this procedure. Additionally, the DFS collects adjustment information for all reported workers' compensation medical bills. When the insurer properly codes and reports their adjustments and reimbursement decisions, the DFS can use their electronic database to identify alleged overutilization. Insurer compliance with electronic bill reporting requirements satisfies their statutory obligation to report all instances of overutilization.²³ The inclusion of insurers and employers in the medical reimbursement dispute provision can lead to confusion over the correct method for insurer or employer reporting of alleged provider violations and insurer reporting of medical overutilization issues.

Expert Medical Advisors and Judges of Compensation Claims

The Office of the Judges of Compensation Claims is responsible for resolving workers' compensation benefit disputes.²⁴ A Judge of Compensation Claims (JCC) receives medical evidence and testimony in the course of administering their assigned cases. Whenever there is a conflict in medical evidence or medical opinion, the JCC must appoint an Expert Medical Advisor (EMA) to address the conflict.²⁵ The EMAs are certified by the DFS.²⁶

Certification as an EMA requires specialized workers' compensation training or experience and medical board certification or eligibility. The DFS is also required to "consider the qualifications, training, impartiality, and commitment of the health care provider to the provision of quality medical care at a reasonable cost."²⁷ Currently, there are 153 EMAs certified by the DFS.²⁸ The procedures that an EMA must abide by and the party responsible for the cost of the EMA's services are established by statute.²⁹

The JCCs often have difficulty finding an eligible EMA to assist them with a case. This often occurs because there are too few EMAs in a particular specialty or the EMAs present in the local area of the injured worker have a conflict in participating in the matter as they have previously treated the injured worker or consulted in their care. When this occurs, the JCC identifies a willing provider with the appropriate qualifications and submits their information to the DFS for certification. Since the JCC has already considered the prospective EMA's qualifications, there is little benefit in going through the additional burden and delay of submitting the prospective EMA to the DFS for certification.

Workers' Compensation Special Disability Trust Fund

The Florida Special Disability Trust Fund (SDTF) was established to encourage the employment of workers with preexisting permanent physical impairments. The SDTF reimburses employers (or their carriers) for the excess in workers' compensation benefits provided to an employee with

²² Chapter 69L-34, F.A.C.

²³ Rule 69L-34.002, F.A.C.

²⁴ Section 440.192, F.S.

²⁵ Section 440.25(4)(d), F.S.

²⁶ Section 440.13(9)(a), F.S.

²⁷ *Id.*

²⁸ FLORIDA DEPARTMENT OF FINANCIAL SERVICES, *Florida Division of Workers' Compensation Expert Medical Advisor List*, <https://apps.fdfs.com/provider/> (last visited Jan. 5, 2016).

²⁹ Section 440.13(9), F.S.

a preexisting 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 funded 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.

Currently, every Notice of Claim against the SDTF must be submitted with a \$250 fee. An insurer that files a notice of claim against the SDTF must submit certain documents to substantiate their claim. If the required documents are not filed with their notice of claim, they must file a proof of claim and include a \$500 fee.

Preferred Worker Program

The Preferred Worker Program (PWP) was enacted by the Legislature and became effective January 1, 1994.³⁰ The intent of the program was to provide financial incentives for employers to hire employees who suffered a workplace injury resulting in permanent physical disability and are unable to return to work for their previous employer. The PWP would reimburse an employer for the costs of workers' compensation insurance premium related to the preferred worker for up to three years of continuous employment. This reimbursement was to be paid from the SDTF.³¹ The Department of Financial Services and the Department of Education have rulemaking authority to implement the program.

III. Effect of Proposed Changes:

Coverage Requirements

The bill removes a requirement that exemption holders revoke their exemptions by mail. This will allow electronic revocations.³² Since the DFS maintains an online exemption application and record review system, the DFS could add online revocation requests to their system.

The bill removes the requirement that exemption applicants provide their Federal Tax Identification Number when filing an electronic application for exemption with the DFS.³³ The Internal Revenue Service does not issue Federal Tax Identification Numbers to individuals; rather, they are issued to businesses. The Federal Tax Identification Number of the applicant's employer will still be collected.

The bill changes a requirement that employers provide their insurer with copies of their employee's certificate of exemption, instead the employer will notify the insurer of the

³⁰ Ch.93-415, s. 43, Laws of Fla.

³¹ Section 440.49(8), F.S.

³² Section 440.05(1), (2), and (5), F.S. DFS reports that 2,314 exemption holders filed voluntary revocations in fiscal year 2014-2015. Email from the Division of Workers' Compensation, Department of Financial Services, (Jan. 6, 2016) (on file with Committee on Banking and Insurance).

³³ Section. 440.05(3), F.S.

exemptions.³⁴ Since the DFS maintains online exemption information, the insurer can still verify the exemption without needing a copy of the certificate of exemption.

The bill removes a requirement that construction employers maintain written exemption acknowledgements by their corporate officers that hold an exemption certificate.³⁵ The bill also eliminates the three-day response requirement applicable to exemption information held by the employer since the DFS maintains these records online.

Compliance and Enforcement; Penalties

The bill reduces the imputed payroll multiplier from 2.0 times the statewide average weekly wage and returns it to the pre-2014 level of 1.5 times the statewide average weekly wage.

The bill adds two new eligibility requirements to the existing penalty credit for achieving compliance after the initiation of an investigation and adds a second penalty credit. The bill requires non-compliant employers to document their purchase of coverage to the DFS within 28 days of the SWO or OPA to qualify for the reduction in penalty and requires that the employer has never before received an SWO or OPA, rather than just an SWO. The bill creates another penalty credit for non-compliant employers who have never previously received an SWO or OPA. If they maintain business records consistent with the requirements of s. 440.107(5), F.S.,³⁶ and timely respond to the written DFS business records requests (a ten-day response requirement), the DFS must reduce their penalty by 25 percent.

Medical Services Disputes

The bill removes insurers and employers from the provision allowing the filing of a medical reimbursement dispute over the disallowance or adjustment of a medical payment. Accordingly, only health care providers are allowed to file petitions for resolution of medical billing disputes.

The bill allows a JCC to designate an EMA of their choosing, rather than only those that are certified as EMAs by the DFS. The EMAs, whether certified by the DFS or designated by the JCC, will continue to be subject to the existing procedural requirements of statute.

Elimination of Fees

The bill eliminates the registration fee of \$100 required of every new workers' compensation carrier that registers with the DFS.³⁷

The bill eliminates the SDTF Notice of Claim Fee of \$250 and the Proof of Claim Fee of \$500 that are deposited into the Special Disability Trust Fund.

³⁴ *Id.*

³⁵Section. 440.05(10), F.S.

³⁶ Section 440.107(5), F.S., requires the DFS to adopt rules specifying the business records that the employer must maintain. Rule 69L-6.015, F.A.C., contains these requirements.

³⁷ Section 440.52(1), F.S.

Other Provisions

The bill removes a requirement that employers notify the DFS by telephone or telegraph within 24 hours of any work related death.³⁸ This relates to an obsolete function when the DFS had a role in workplace safety investigations. However, the DFS' former workplace safety role is preempted to the federal Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor with some exceptions.³⁹ The employers not covered⁴⁰ by the OSHA include self-employed workers, immediate family members of farm employers, and workers whose hazards are regulated by another federal agency (for example, the Mine Safety and Health Administration, the Department of Energy, or Coast Guard).⁴¹ The DFS will continue to receive reports of death through an existing employer-reporting requirement.⁴²

The bill eliminates the Preferred Worker Program. The program has experienced a small number of claims and has not made any program reimbursements in over a decade. The DFS reports that the program paid seven claims totaling \$15,915 since 1994. The DFS last issued a reimbursement under the program in 2002.⁴³

The bill provides technical, conforming changes to revise cross-references to conform to changes made by the bill.

The bill is effective October 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

³⁸ Section 440.185(3), F.S.

³⁹ The OSHA requires employers subject to OSHA to report fatalities within 8 hours. Available at <https://www.osha.gov/as/opa/worker/employer-responsibility.html>.

⁴⁰ See https://www.osha.gov/OSHA_FAQs.html (last visited January 26, 2016).

⁴¹ Workers at state and local government agencies are not covered by Federal OSHA, but have the OSHA protections if they work in those states that have an OSHA-approved state program.

⁴² Section 440.185(2), F.S.

⁴³ Florida Department of Financial Services, 2016 Agency Analysis of Senate Bill 986 (Jan. 6, 2016).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

CS/SB 986 eliminates the new insurer registration fee of \$100 and the Special Disability Trust Fund (SDTF) Notice of Claim and Proof of Claim fees of \$250 and \$500, respectively. The total annual fee reduction is approximately \$1,500.

B. Private Sector Impact:

The bill eliminates the new insurer registration fee of \$100. The DFS reports that four registrations for new workers' compensation insurers were received in Fiscal Year 2014-2015.

Insurers filing SDTF Notices of Claim or Proofs of Claim will no longer be assessed the \$250 and \$500 fee, respectively.

C. Government Sector Impact:

The elimination of fees will result in a decrease in collections of approximately \$1,500 in the SDTF. The SDTF received no notices of claims or proofs of claims in Fiscal Year 2013-2014 and one notice of claim in Fiscal Year 2014-2015.⁴⁴ The DFS reports that four new registrations were received in Fiscal Year 2014-2015.⁴⁵

The 25 percent reduction in penalties for employers who have not been previously issued a SWO or penalty will result in approximately \$1 million less that is deposited into the Workers' Compensation Administration Trust Fund. This estimate is based on a 25 percent collection rate of the penalties. The DFS anticipates that the reduced penalty may increase the percentage actually collected which may offset the fiscal impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 440.021, 440.05, 440.107, 440.13, 440.185, 440.42, 440.49, 440.50, 440.52, and 624.4626.

⁴⁴ AMI Risk Consultants, Inc., *State of Florida Special Disability Trust Fund Actuarial Review as of June 30, 2015*, at 5, available at http://www.myfloridacfo.com/Division/WC/pdf/State-of-Florida-Disability-Trust-Fund_2015_FINAL_09-10-15.pdf.

⁴⁵ Email from The Division of Workers' Compensation, Department of Financial Services, (Jan. 6, 2016) (on file with Senate Committee on Banking and Insurance).

IX. Additional Information:

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

CS by Banking and Insurance on February 2, 2016:

The CS reinstates current statutory coverage requirements for non-construction limited liability companies and clarifies the process for the appointment of an expert medical advisor.

- B. **Amendments:**

None.