

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 983 Ratification of Rules of the Department of Financial Services

**SPONSOR(S):** Casello

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1210

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	13 Y, 0 N	Lloyd	Luczynski
2) Oversight, Transparency & Public Management Subcommittee	13 Y, 0 N	Moehrle	Harrington
3) Commerce Committee			

### SUMMARY ANALYSIS

Effective October 1, 2018, workers' compensation wage replacement benefits are provided in specified circumstances for post-traumatic stress disorder (PTSD) suffered by a first responder, i.e., a law enforcement officer, a firefighter, an emergency medical technician, or a paramedic, regardless of whether the individual's PTSD is accompanied by a physical injury requiring medical treatment. First responder PTSD-related wage replacement benefits, in addition to currently available medical benefits, must be paid if the first responder is diagnosed by a psychiatrist with PTSD following certain specified death-related events that were experienced while acting in the course and scope of his or her employment. These death-related events include working a call involving the death of a child, a homicide, or the death, including suicide, of a person who suffered grievous bodily harm of a nature that shocks the conscience. The circumstances include seeing the decedent, seeing or hearing the injury or death, and participating in the treatment or transport of those who die in these events.

The Department of Financial Services (DFS) adopted a rule, as required by law, to specify the types of third-party injuries qualifying as grievous bodily harm of a nature that shocks the conscience for the purposes of allowing wage replacement benefits for first responder PTSD. A statement of estimated regulatory costs (SERC) must be prepared if a proposed rule will have an adverse impact on small business or is likely to directly or indirectly increase regulatory costs in excess of \$200,000 aggregated within one year after implementation. If the SERC shows that the adverse impact or regulatory costs of the proposed rule exceeds \$1 million in the aggregate within five years after implementation, then the proposed rule must be submitted to the Legislature for ratification. The DFS SERC indicates that the rule will exceed \$1 million within five years after implementation. Accordingly, the rule must be ratified by the Legislature to be effective. As such, rule 69L-3.009, F.A.C., was submitted to the Legislature for ratification.

The bill ratifies the DFS rule, rule 69L-3.009, F.A.C. The bill serves no other purpose and will not be codified in the Florida Statutes. The bill specifies that after becoming law, its enactment and effective dates will be noted in the Florida Administrative Code, the Florida Administrative Register, or both, as appropriate.

The bill has an indeterminate impact on state and local government expenditures. See Fiscal Comments.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### **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.<sup>1</sup> Rulemaking authority is delegated by the Legislature<sup>2</sup> through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”<sup>3</sup> a rule. The Administrative Procedure Act<sup>4</sup> sets forth a uniform set of procedures agencies must follow when exercising delegated rulemaking authority. Agencies do not have discretion whether to engage in rulemaking.<sup>5</sup> To adopt a rule, an agency must have a general grant of authority to implement a specific law by rulemaking.<sup>6</sup> The grant of rulemaking authority itself need not be detailed.<sup>7</sup> 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.<sup>8</sup>

An agency begins the formal rulemaking process by filing a notice of rule development of proposed rules in the Florida Administrative Register (FAR) indicating the subject area to be addressed by the rule development and including a short, plain explanation of the purpose and effect of the rule.<sup>9</sup> The notice may include the preliminary text of the proposed rule, but it is not necessary. Next, an agency must file, upon approval of the agency head, a notice of proposed rule.<sup>10</sup> The notice is published by the Department of State in the FAR<sup>11</sup> and must provide certain information, including the text of the proposed rule, a summary of the agency’s statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. A SERC must be prepared if a proposed rule will have an adverse impact on small business or is likely to directly or indirectly increase regulatory costs in excess of \$200,000 aggregated within one year after implementation. 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.<sup>12</sup>

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, including the rule’s likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment;<sup>13</sup> the likely adverse impact on business competitiveness,<sup>14</sup> productivity, or innovation;<sup>15</sup> and whether the rule is likely to

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

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

<sup>3</sup> S. 120.52(17), F.S.

<sup>4</sup> Ch. 120, F.S.

<sup>5</sup> S. 120.54(1)(a), F.S.

<sup>6</sup> Ss. 120.52(8) and 120.536(1), F.S.

<sup>7</sup> *Save the Manatee Club, Inc.*, *supra* note 2, at 599.

<sup>8</sup> *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

<sup>9</sup> S. 120.54(2), F.S.

<sup>10</sup> S. 120.54(3)(a)1., F.S.

<sup>11</sup> S. 120.55(1)(b)2., F.S.

<sup>12</sup> S. 120.541(2)(a), F.S.

<sup>13</sup> S. 120.541(2)(a)1., F.S.

<sup>14</sup> Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

<sup>15</sup> S. 120.541(2)(a)2., F.S.

increase regulatory costs, including any transactional costs.<sup>16</sup> 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 after implementation, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

### Wage Replacement Benefits for First Responders with Post-traumatic Stress Disorder (PTSD)<sup>17</sup>

Workers' compensation provides medical benefits and, in cases where the injured worker is unable to work or earn as much as he or she did before the injury, compensation for lost income (also referred to as "wage replacement" or "indemnity" benefits) for physical injuries arising out of work performed by an employee in the course and scope of employment.<sup>18</sup> Where a physical injury is accompanied by a mental or nervous injury, medical benefits in the form of psychological/psychiatric care must be provided if they are medically necessary and are caused by the accident involving the physical injury. Without a physical injury, mental or nervous injuries are not compensable, except for first responders.

In 2007, the Legislature enacted significant changes in workers' compensation benefits for first responders that provided benefits and standards for determining benefits for employment-related accidents and injuries of first responders. The term "first responder" is defined as a law enforcement officer,<sup>19</sup> a firefighter,<sup>20</sup> or an emergency medical technician or paramedic<sup>21</sup> employed by state or local government.<sup>22</sup> Further, a volunteer law enforcement officer, firefighter, or emergency medical technician or paramedic engaged by the state or a local government is considered a first responder of the state or local government.<sup>23</sup>

Although mental or nervous injuries are generally not compensable under the workers' compensation law, the law was amended to provide medical benefits for first responders who experience a mental or nervous injury without an accompanying physical injury. However, while medical treatment is covered,

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<sup>16</sup> S. 120.541(2)(a)3., F.S.

<sup>17</sup> The American Psychiatric Association provides diagnostic criteria for mental disorders, including post-traumatic stress disorder (PTSD) in its *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5). American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th edition (2013). PTSD is a psychiatric disorder that can occur in people who have experienced or witnessed a traumatic event such as a natural disaster, a serious accident, a terrorist act, war, combat, rape, or other violent personal assault. A diagnosis of PTSD requires exposure to an upsetting traumatic event. However, exposure could be indirect rather than first hand. American Psychiatric Association, *What is Posttraumatic Stress Disorder?*, <https://www.psychiatry.org/patients-families/ptsd/what-is-ptsd> (last visited Mar. 8, 2019). Symptoms generally begin within the first three months after the trauma, although there may be a delay of months or even years before the criteria for the diagnosis are met. Although estimates vary across occupations and the general population, some studies indicate that first responders and other professionals who are exposed to potentially traumatic events in their workplace are four to five times more likely to develop PTSD compared to the general population. *Psychological Trauma: Theory, Practice, and Policy* 2015, Vol. 7, No. 5, 500-506. A 2015 survey of 4,000 first responders found that 6.6 percent had attempted suicide, which is more than 10 times the rate in the general population. Wes Venteicher, *Increasing suicide rates among first responders spark concerns*, FIRE RESCUE NEWS, Mar. 19, 2017, available at <https://www.firerescue1.com/fire-ems/articles/222673018-Increasing-suicide-rates-among-first-responders-spark-concern/> (last visited Mar. 8, 2019).

<sup>18</sup> S. 440.09(1), F.S.

<sup>19</sup> The term "law enforcement officer" means any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. The term includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers, or auxiliary law enforcement officers but does not include support personnel employed by the employing agency. Section 943.10, F.S.

<sup>20</sup> The term "firefighter" means an individual who holds a current and valid Firefighter Certificate of Compliance or Special Certificate of Compliance issued by the Division of State Fire Marshal within the Department of Financial Services. S. 633.102, F.S.

<sup>21</sup> The term "emergency medical technician" means a person who is certified by the Department of Health to perform basic life support. The term "paramedic" means a person who is certified by the Department of Health to perform basic and advanced life support. Section 401.23, F.S.

<sup>22</sup> Ch. 2007-1, Laws of Fla.

<sup>23</sup> S. 112.1815, F.S.

first responders without an accompanying physical injury do not qualify for wage replacement benefits, except as described below.<sup>24</sup>

Effective October 2018, the Legislature enacted a reform to provide wage replacement benefits to first responders who suffer PTSD, in certain circumstances, without having also sustained a physical injury in the course and scope of their employment. The Legislature deemed first responder PTSD to be an occupational disease. As such, wage replacement benefits are provided, in addition to the medical benefits currently allowed for mental and nervous injuries, for claims where no physical injury has occurred. The first responder will qualify for PTSD-related wage replacement benefits if the first responder:

- Was acting within the course and scope of employment; and
- Is diagnosed, following an examination by the employer's or carrier's authorized treating psychiatrist, with PTSD due to:
  - Seeing a deceased minor;
  - Directly witnessing the death of a minor or an injury to a minor who subsequently died prior to or upon arrival at a hospital emergency department;
  - Participating in the physical treatment of or manually transporting an injured minor who subsequently died prior to or upon arrival at a hospital emergency department;
  - Seeing someone who died due to grievous bodily harm of a nature that shocks the conscience;
  - Directly witnessing a death due to:
    - Grievous bodily harm of a nature that shocks the conscience, including suicide; or
    - Homicide, including murder, mass killing, manslaughter, self-defense, misadventure, or negligence;
  - Directly witnessing an injury, including an attempted suicide, to a person who suffered grievous bodily harm of a nature that shocks the conscience if the injured person subsequently died prior to or upon arrival at a hospital emergency department;
  - Participating in the physical treatment of an injury, including an attempted suicide, to a person who suffered grievous bodily harm of a nature that shocks the conscience if the injured person subsequently died prior to or upon arrival at a hospital emergency department;
  - Manually transporting a person who was injured, including by attempted suicide, and suffered grievous bodily harm of a nature that shocks the conscience if the injured person subsequently died prior to or upon arrival at a hospital emergency department.

To implement the 2018 legislative changes, the Department of Financial Services (DFS) was required to adopt a rule specifying the types of third party injuries qualifying as grievous bodily harm of a nature that shocks the conscience for the purposes of allowing wage replacement benefits for first responder PTSD. On December 5, 2018, DFS filed Rule 69L-3.009, F.A.C., with the Florida Department of State for adoption to be effective upon legislative ratification.

The rule specifies that the following third party injuries qualify as a grievous bodily harm of a nature that shocks the conscience for the purposes of determining a first responder's eligibility for wage replacement benefits due to PTSD:

- Decapitation (full or partial),
- Degloving,
- Enuclation,
- Evisceration,
- Exposure of one or more of the following internal organs:
  - Brain,
  - Heart,

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<sup>24</sup> S. 112.1815(2)(a)3., F.S.  
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- Intestines,
- Kidneys,
- Liver, or
- Lungs
- Impalement,
- Severance (full or partial), and
- Third degree burn on 9 percent or more of the body.

#### SERC - Impact of Rule 69-3.009, F.A.C.

The SERC for Rule 69-3.009, F.A.C., states that the rule may have a regulatory impact of \$8.8 million to \$9.7 million in the first five years after becoming effective.<sup>25</sup>

#### **Effect of the Bill**

The bill ratifies Rule 69L-3.009, F.A.C., solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S., and expressly limits ratification to the effectiveness of the rule. The bill directs that the act must not be codified in the Florida Statutes, but only noted in the historical comments to the rule by the Department of State.

#### B. SECTION DIRECTORY:

**Section 1.** Ratifies Rule 69L-3.009, F.A.C .

**Section 2.** Provides an effective date of upon becoming law.

### **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

Indeterminate. See Fiscal Comments, below.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None.

##### 2. Expenditures:

Indeterminate. See Fiscal Comments, below.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

<sup>25</sup> Email from Meredith Stanfield, Director of Legislative and Cabinet Affairs, Department of Financial Services, Re: HB 983 – ratification package (Mar. 8, 2019). DFS did not differentiate between the impact of implementing the statute and the impact of implementing the rule-based list of qualifying injuries on regulatory cost when determining the estimated regulatory cost.

**D. FISCAL COMMENTS:**

The rule adopts a list of qualifying injuries to third parties that support a claim for first responder PTSD. Since the statute creates a new path to indemnity benefits, there are no prior claims to analyze the impact the rule will have on expenditures. Rather than reducing expenditures, the rule prevents them from developing in the first place for claims associated with third party injuries that are excluded from the list provided by the rule.<sup>26</sup>

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

**1. Applicability of Municipality/County Mandates Provision:**

Not Applicable. This bill does not appear to affect county or municipal government.

**2. Other:**

None.

**B. RULE-MAKING AUTHORITY:**

None provided by the bill.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.

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<sup>26</sup> *Id.*