

# 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 108

SPONSOR: Banking and Insurance Committee and Senator Smith

SUBJECT: Workers' Compensation

DATE: December 3, 2001      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable/CS</u>
2.	<u>Bowman</u>	<u>Yeatman</u>	<u>CA</u>	<u>Favorable</u>
3.	_____	_____	<u>AGG</u>	_____
4.	_____	_____	<u>AP</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

Under current Florida law, workers' compensation insurance only covers an employee's injury if the injury arises out of and occurs within the course and scope of employment. An employee is not considered to be acting within the course and scope of employment when "going to or coming from" work, unless engaged in a special errand or mission for the employer (this is known as the "going or coming" rule).

Law enforcement officers now enjoy a limited exception to the "going or coming" rule when injured while carrying out their "primary responsibility" to prevent or detect crime or enforce the penal, criminal, traffic, or highway laws of the state, while off-duty. They are deemed by operation of s. 440.091, F.S., to have been injured within the course of employment, and therefore are covered by workers' compensation. Currently, firefighters responding to fire emergencies while off duty or outside of the employer's jurisdiction do not enjoy a similar exception to the "going or coming rule."

This bill broadens the circumstances in which firefighters are considered to be acting within the course and scope of employment and, accordingly, covered by workers' compensation. The bill would provide that a firefighter that is engaged in firefighting within Florida, but outside of the employer's jurisdiction or off-duty, and not engaged in services by a private employer, to be acting within the course of employment and thereby covered by workers' compensation.

This bill substantially amends section 440.091, Florida Statutes.

## II. Present Situation:

Pursuant to chapter 440, the workers' compensation system provides indemnity and medical benefits to injured employees. In order for an employee to be entitled to workers' compensation benefits, the law requires that the injury "arise out of" and be in the course and scope of the employment. Section 440.02(16)(b), F.S., defines employment to include volunteer firefighters responding to or assisting with fire or medical emergencies whether or not the firefighters are on duty.

### "Arising Out Of" the Employment

Pursuant to s. 440.02(32), F.S., an injury is deemed to arise out of employment "if work performed in the course and scope of employment is the major contributing cause of the injury." Much litigation in workers' compensation has been devoted to the issue of whether an injury arose out of and occurred in the course and scope of employment. The First District Court of Appeal stated that in order to establish that an accident arose out of, and occurred in the course and scope of, the employment, it is "sufficient for the claimant to prove that her injury occurred in the period of her employment, at a place where she would reasonably be, while fulfilling her duties." *Hillsborough County School Board v. Williams*, 565 So.2d 852, 853-54 (Fla. 1st DCA 1990).

### Going and Coming Rule

According to Florida law, if an injury is suffered while going to or coming from work, the injury is not one that arises out of and in the course of employment. [s. 440.092(2), F.S.] However, if the employee was engaged in a "special errand or mission" for the employer while going to or coming from work, the injury is deemed to arise out of and in the course of employment. Florida courts have stated that an employee is on a special errand if the journey was a substantial part of the service performed for the employer. *D.C. Moore & Sons v. Wadkins*, 568 So.2d 998 (Fla. 1st DCA 1990). Courts have held that an employee is on special errand where the employee is instructed by the employer to perform a special errand, which grows out of and is incidental to his employment. *Bruck v. Glen Johnson, Inc.*, 418 So.2d 1209, 1211 (Fla. 1st DCA 1982). A typical "special errand" exists when the employer calls the employee at home, and instructs him to deviate from his normal route into work to pick up an item needed for the purposes of employment that day. See *Spartan Food Systems & Subsidiaries v. Hopkins*, 525 So.2d 987 (Fla. 1st DCA 1988) (Employee directed to pick up drink cups on way into work).

### Within the Course of Employment – Off-Duty Law Enforcement Officers

Section 440.091, F.S., provides that if an employee: is elected, appointed, or employed full-time by a municipality, the state, or any political subdivision, is vested with authority to bear arms and make arrests, and whose primary responsibility is the prevention or detection of crime or the enforcement of penal, traffic, or criminal laws of the state; was discharging that primary responsibility within the state in a place and under circumstances reasonably consistent with that primary responsibility; and was not engaged in services for a private employer; the employee is deemed to have been acting in the course and scope of employment.

Courts recently have held that s. 440.091, F.S., applies to off-duty officers, rather than on-duty officers. In *Klyse v. City of Largo*, 765 So.2d 270 (Fla 1st DCA 2000), while an officer was driving home in his unmarked vehicle for lunch, he was involved in an automobile accident in which he sustained injuries. According to the collective bargaining agreement, officers were considered to be on duty while at lunch, and were paid for that time; however, they were subject to call and their lunch could be interrupted to respond to a call. The employer/carrier denied benefits on the grounds that the accident was not within the course and scope of employment, and the claimant was not discharging responsibilities of a law enforcement officer, pursuant to s. 440.091, F.S. The court ruled that s. 440.091, F.S., does not apply to on-duty officers and the claimant was involved in an activity that his employer specifically designated as being part of his employment; thus, no deviation of employment occurred; therefore the officer should be provided coverage.

An off-duty officer who is not carrying out his primary responsibilities is not acting within the course of his employment for workers' compensation purposes. *Palm Beach County Sheriff's Office v. Ginn*, 570 So.2d 1059 (Fla. 1st DCA 1990) (Although an officer is on call for duty and has police radio and other indicia of authority, these factors are not dispositive in determining whether an off-duty officer is acting within the course of his employment. The issue is whether the officer was carrying out his "primary responsibility"). In *City of Fort Lauderdale v. Abrams*, 561 So.2d 1294 (Fla. 1st DCA 1990), a forensic detective was on her way to work in her personal vehicle when she was struck from behind at a red light. Because the forensic detective was not investigating a crime or enforcing the law when she was struck from behind, the court stated that she was not carrying out her primary responsibility. As a result, the court held the injury did not arise out of or within the course and scope of her employment and was not covered by workers' compensation.

### **Firefighters**

Recently, a firefighter employed with the City of Palatka responded to a call in the neighboring City of Interlachen while he was off-duty. Volunteer firefighters responding at the scene indicated that they needed assistance. The Palatka firefighter was injured while assisting at the scene. Although Putnam County officials initially indicated that this injury would be covered by the county's workers compensation coverage, ultimately, the county did not provide compensability for the injury. Then, the City of Palatka agreed to cover the injury through their workers' compensation coverage. However, the insurance carrier for the city denied compensability for the injury since the firefighter was not acting in his official capacity with the city at the time of the injury. Subsequently, the firefighter used private insurance to cover the medical costs and personally paid for certain expenses that were not covered by the policy. According to the Fire Chief in Palatka, this type of situation is a statewide problem and that firefighters traditionally do assist at scenes when off-duty.

The term "firefighter," is defined by s. 112.191, F.S., to include any full-time, employed firefighter whose primary duty is the prevention and extinguishment of fires and the protection of life and property, who is certified pursuant to s. 633.35, F.S., and who is a member of duly constituted fire department or who is a volunteer firefighter.

Under the provisions of s. 633.35, F.S., no person may be employed as a permanent firefighter by a state or local governmental entity or private entity for a period in excess of one year until such person attends a firefighter-certification program of not less than 360 hours. An individual that does not hold such a certification is prohibited from engaging in certain hazardous firefighting operations. However, a person who has previously served as a volunteer firefighter and is then employed as a permanent firefighter may function, during this period, in the same capacity in which he or she acted as a volunteer firefighter, provided such an individual has completed all training required by the volunteer organization. Volunteer firefighters are generally exempt from the certification requirements of ch. 633, F.S. However, the Attorney General opined that volunteer firefighters who are paid any compensation for performing firefighter services are considered employees and must be certified under the provisions of chapter 633, F.S. [AGO 2000-12]

### III. Effect of Proposed Changes:

**Section 1.** Amends s. 440.091, F.S., to broaden the circumstances in which firefighters, as defined in s. 112.191, F.S., are considered to be acting within the course and scope of employment and, accordingly, covered by workers' compensation. The section provides that a firefighter engaged in firefighting within Florida, while off-duty or outside of the employer's jurisdiction, and not engaged in services that were compensated by another employer at the time, to be acting within the course of employment and thereby covered by workers' compensation.

This provision would apply to firefighters that are employed on a full-time basis by a governmental entity (county, municipality, state, or other political subdivision) and volunteer firefighters. Current law provides coverage for a volunteer firefighter who is off-duty, due to the inclusion of volunteer firefighters in the current definition of "employment."

**Section 2.** Provides that the bill fulfills an important state interest and therefore the bill would be exempt from the local government mandate provision of Section 18, Article VII of the State Constitution and would apply to counties and municipalities if both houses of the legislature pass the bill by a two-thirds vote.

**Section 3.** Provides that this act will take effect July 1, 2002.

### IV. Constitutional Issues:

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

Article VII, s. 18 of the Florida Constitution provides that counties and municipalities are not bound by general laws that require them to spend funds or to take an action that requires the expenditure of funds unless the Legislature determines that the law fulfills an important state interest or meets other select exceptions, such as an insignificant fiscal impact. Section 2 of the bill provides legislative findings that the bill fulfills an important state interest.

There will likely be a fiscal impact on cities and counties, due to a broadened scope of coverage of their certified firefighters employees. The fiscal impact on the local governments will be determined by the number and severity of future claims, and the

premium increase, if any, resulting from such additional covered claims. The amount is indeterminate and it is unknown whether the amount is significant enough to trigger the protection of Article VII, s. 18. For cities or counties that currently provide for such coverage through a collective bargaining agreement or other employment agreement there would be no fiscal impact.

**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:**

To the extent that workers' compensation coverage for firefighters is expanded to provide coverage for accidents that were not previously covered (injuries occurring off-duty or outside the employer's jurisdiction while responding to a fire), this bill may result in the cost shifting of claims that were previously denied and now would be covered, from the employee to the state or local government and ultimately the taxpayers.

**C. Government Sector Impact:**

The fiscal impact on state agencies and local governmental entities that employ firefighters is indeterminate at this time.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.