

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- The bill increases rulemaking required of the Agency for Workforce Innovation.

Ensure lower taxes -- This bill may result in slightly lower UC tax rates for most employers.

Promote personal responsibility -- The bill provides criminal penalties for theft-related offenses related to unemployment compensation. The bill provides civil and criminal penalties for wrongful tax avoidance behavior (SUTA dumping).

B. EFFECT OF PROPOSED CHANGES:

SUTA Dumping

The unemployment compensation (UC) program is a federal-state partnership based upon federal law, but administered by state law. The program is funded solely by federal and state employer payroll taxes and is designed as an insurance against the affects of unemployment on local economies.

Federal law defines certain requirements for the program. The Social Security Act (SSA) and the Federal Unemployment Tax Act (FUTA) set forth broad coverage provisions, some benefit provisions, the federal tax base and rate, and administrative requirements. The major functions of the federal government are to:

- Ensure conformity and substantial compliance of state law, rules, and regulations with federal law;
- Determine administrative funding requirements and provide money to states for proper and efficient administration;
- Set broad overall policy for administration of the program;
- Hold and invest all money in the unemployment trust fund until needed by states for the payment of compensation.

The money provided to states for the administration of their programs is derived from the federal payroll tax created under FUTA. Monies held in deposit from the State payroll taxes established under the States' Unemployment Tax Act (SUTA) are used solely for the payment of unemployment compensation.

State unemployment taxes must be based on an experience rating system in order for employers in the state to receive the additional credit against FUTA. Under experience rating, the state unemployment tax rate of an employer is based on the amount of UC benefits paid to former employees. The more UC paid to former employees, the higher the tax rate of the employer, up to a maximum established by state law. Experience rating helps ensure an equitable distribution for costs and provides an incentive for employers to fully participate in the UC program.

However, all compensation costs attributable to an employer's experience cannot be recovered from individual employers because the law limits the maximum rate and some benefits are not chargeable to the account of any employer. In addition, new employers are subject to an initial rate while their

accounts are earning experience. These factors, in combination with the balance of the trust fund, determine costs that all employers with unemployment experience must share.

SUTA dumping is the practice of avoiding negative unemployment experience. The effect of SUTA dumping is to increase tax rates to employers with unemployment experience who are not at the initial or maximum rate to experience.

SUTA dumping occurs primarily in 2 ways:

- An employer escapes poor experience (and high experience rates) by setting up one or more shell companies and then transferring some or all of its workforce (and the accompanying payroll on which tax is due) to the shell company after the shell has earned a low experience rate. The transferred payroll is then taxed at the shell's lower rate. This allows the first company to begin earning low rate and by the time the shell has earned a high rate the employer transfers the payroll back to the first company.
- A person or entity commencing a business purchases an existing small business with a low unemployment tax rate. Instead of being assigned the rate for a new employer, the entity receives the lower rate of the acquired business. In this scenario the new business ceases the business enterprise of the business that it acquired and commences a different type of business activity.

Title III of the SSA provides for payments from the federal Unemployment Trust Fund for state program administration. To receive administrative grants, states must comply with the provisions of Section 303, SSA.

In August 2004 Congress enacted the "SUTA Dumping Prevention Act of 2004", P.L. 108-295. The act amended Section 303 of the SSA to provide certain provisions relating to unemployment tax administration that states must incorporate into their laws in order to receive their administrative funding. The amendments to the SSA require state laws to prohibit these forms of SUTA dumping as a condition of states receiving administrative grants for the UC program. It also requires states to impose penalties for knowingly violating or attempting to violate these provisions of state law.

Penalties

Section 443.071, F.S., provides that persons who make intentionally false statements or fail to disclose a material fact to obtain or increase benefits commit a third degree felony punishable as provided in s. 775.082, F.S.,¹ 775.083, F.S.,² or s. 775.084, F.S.³

Subsection (4) of s. 443.071, F.S., establishes the conditions whereby prima facie evidence of the identity of an individual can be established for prosecution. This evidence, which includes the individual's gender, height, weight, and race, is information that could be gathered and attested to by employees of UC claims offices when the former Division of Unemployment Compensation in the now abolished Department of Labor and Employment Security operated a network of local UC claims offices.

Since enactment of the Workforce Innovation Act of 2000⁴, UC claims filing is executed through remote filing means that include the Internet, telephone and mail claims. Individuals claiming benefits no longer need to report to an office and stand in line to meet face-to-face with a claims taker. The time

¹ Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.

² Fines

³ Violent Career Criminals; habitual felony offenders and habitual violent felony offenders; three-time violent felony offenders; definitions; procedure; enhanced penalties or mandatory prison terms.

⁴ Ch. 2000-165, L.O.F.

that was spent reporting to the UC claims office can now be used by the individual to visit his or her local one-stop career center operated by the local regional workforce board to seek work or obtain training to update job skills.

Employers who make false statements or representations to cause benefits to be reduced also commit a third degree felony and employers who fail to furnish reports required or maintain payroll records required by the law commit a felony of the second degree.⁵ However, the law contains no specific prohibition against creating fictitious employing units wherein sham businesses are created through electronic submission of fraudulent registration, wage and tax reports through computer systems used by the agency's tax collection service provider, the Department of Revenue.

Racketeering

Chapter 895, F.S., is the "Florida Racketeer Influenced and Corrupt Organization Act" (RICO Act). The RICO act penalizes persons who engage in a pattern of criminal conduct. Section 895.02, F.S., lists 43 Florida statutes, the violation of which may qualify as racketeering activity, including s. 409.920, F.S., and 409.9201, F.S., relating to Medicaid fraud; s. 414.39, F.S., relating to public assistance fraud; s. 440.105, F.S., and s. 440.106, F.S., relating to Workers' Compensation. Offenses related to ch. 443, F.S., which offenses are similar in nature to other racketeering offenses, are not within the list of predicate offenses leading to a RICO charge.

Procedures Concerning Claims

Section 443.151, F.S., provides for procedures relating to unemployment compensation claims. Whenever a claim is filed the agency is charged with the responsibility for making determinations relating to an individual's eligibility and when appropriate disqualification for benefits as well as determinations on the chargeability of employers' accounts for benefits that may be paid on a claim. A party disagreeing with the determination has 20 days from the mailing date of the determination to file a request for an appeals hearing.

Unemployment Compensation Appeals

When a party to a determination files a lower level appeal with the agency's Office of Appeals, subsection (4) of s. 443.151, F.S., provides requirements on appeals referees for administrative hearings. Administrative rules on hearings before appeals referees, found in ch. 60BB-5, F.A.C., are promulgated for the Office of Appeals by the Unemployment Appeals Commission, pursuant to s. 443.012, F.S.

Although the Unemployment Appeals Commission is authorized to issue an Order to Show Cause why an appeal to its body that appears untimely should be accepted as timely, the commission has construed paragraph (a) of subsection (4) of s. 443.151, F.S., to require a hearing be held in all first level appeals cases administered by the agency's Office of Appeals. Consequently, the Office of Appeals must annually schedule and conduct approximately 4,000 hearings, or 4.1% of its annual workload, when no basis for the hearing has been established because of the apparent untimeliness of the appeal. Hearings require an investment in time on all parties involved, which include businesses as well as benefit applicants. If during the hearing the appeals referee finds that the appeal was not filed timely, the hearing ends since the case must be dismissed because the appeals referee has no jurisdiction.

Dismissing an appeal based on an Order to Show Cause would avoid the unnecessary inconvenience for the parties in preparing for and attending a hearing, as well as the agency costs associated with scheduling and conducting hearings that are not necessary merely to determine the timeliness of the

⁵ See s. 443.071(2), (3), F.S.

appeal. This procedure is not unique. With respect to other types of Florida administrative hearings, s. 120.569, F.S., permits dismissal of an untimely appeal without first conducting a hearing.

If the appeals referee were authorized by law to issue an Order to Show Cause why the appeal should be considered timely, the appellant would have the opportunity to present to the referee relevant information in writing that would allow the referee to determine whether a hearing should be conducted.

If after responding to the Order to Show Cause, the referee found the appeal was untimely and should be dismissed, the appellant would still be issued a decision on this matter, which upon the appellant's request would be subject to review by the Unemployment Appeals Commission.

Recovery and Recoupment

Whenever an individual is found to have been paid benefits to which he or she is not entitled, s. 443.151(6), F.S., provides procedures for recovery and recoupment of the benefits. Recovery is the cash repayment of the overpayment by the benefit recipient on behalf of the trust fund. Recoupment is the process of using future claims for weeks of unemployment to offset the claims that were previously paid and that resulted in the overpayment. The law authorizes the waiver of recoupment of benefits when the benefits overpaid were received by the individual without fault on the person's part; when it would defeat the purpose of the chapter; or when recoupment would be inequitable and against good conscience.⁶ However, recovery of an overpayment cannot be waived by the agency.

Paragraph (b) of subsection (6) of s. 443.151, F.S., provides that the agency has two years from the date of the redetermination or decision that created the overpayment to effect recovery. However, during this period many individuals are recovering from the affects of unemployment and although willing to repay the benefits they are not always financially able to make repayment. If the statute of limitations for recovery of non-fraud overpayments were extended by a year the Agency believes that it would lead to increased collections.

Exceptions to the Administrative Procedure Act, ch. 120, F.S.

Section 120.80, F.S., provides exceptions and special requirements for administrative hearings conducted by various agencies. Subsection (10) relates to exceptions for the Agency for Workforce Innovation. Special deputies are designated in ch. 443, to conduct hearings relating to appeals involving unemployment tax.

In 2000, the UC program and certain powers and duties of the former Division of Unemployment Compensation and the former Department of Labor and Employment Security were transferred to the Agency of Workforce Innovation. In 2003, a glitch bill was proposed and passed.⁷ It appears that the intent of Section 3 of the bill was to exempt from the special requirements for administrative hearings relating to unemployment compensation under ch. 443, F.S., not only the Unemployment Appeals Commission appeals referees, but also the agency's special deputies. The bill as passed failed to include specific reference to special deputies. As a result, special deputies are subject to the requirements of ch. 120, F.S., although the remainder of the agency is exempt.

Benefit Eligibility

Section 443.091, F.S., provides for benefit eligibility conditions. These include requirements for filing claims, registering for work, being able and available for work, and participating in reemployment services as directed by the agency. Other eligibility conditions prescribe the requirement to have served a waiting week during a benefit year for which no benefits can be paid, and the requirement to have worked and earned income equal to at least three times the weekly benefit amount of a new claim

⁶ See s. 443.151(6)(c), F.S.

⁷ Chapter 2003-36 L.O.F.

if the applicant received benefits on a prior claim. This section of law also prohibits benefits for school employees who are unemployed between school terms and professional athletes between sports seasons.

FUTA requires that individuals who are attending approved training to update their job skills are not subject to a denial of benefits because of their failure to look for work, register for work, or participate in reemployment services. However, as s. 443.091(1)(c)2., F.S., is currently written, an individual in approved training is exempt from all other eligibility conditions.

Definition of Employment

Section 443.1216, F.S., defines “employment.” This section specifies that wages that are insured under the program must be earned in covered employment. Subsection (13) describes service that is exempt from coverage. However, that section describing service that is not covered uses the term “employment.” As a result, the Agency recommends an amendment that removes the term “employment” from this subsection to provide clarification.

Wages

Section 443.1217, F.S., relates to wages. This is a new section of law that was created from other sections during the legislative process that resulted in ch. 2003-36, L.O.F. The UC system determines the amount of benefits an individual is entitled to receive on a claim according to the wages earned in employment. Subsection (1) of s. 443.1217, F.S., prescribes what wages are subject to the chapter. However subsection (2) relates to wages on which employers do not have to pay tax. According to the Agency, a technical amendment to this subsection is needed to ensure there is no misunderstanding that the wages specified in subsection (2) are only exempt from the chapter with respect to determining an employer’s contributions.

Variation of Contribution Rates Based on Benefit Experience

Subsection (3) of s. 443.131, F.S., provides Florida’s process for determining experience based tax rates of contribution as is required by FUTA. Rates are determined according to several ratios that take into consideration an employer’s individual experience with unemployment in addition to ratios that attempt to recover costs to the fund that cannot be recovered directly from an employer because of noncharged benefits, that is those benefits that are not chargeable to the accounts of an employer pursuant to the provisions of s. 443.131(3)(a), F.S.⁸, and because of the tax rate ceiling. One of these shared factors relates to excess payments. This ratio is a measure of the benefits that are attributable to employers who have the maximum tax rate and cannot be assigned a higher rate of contribution although they would earn a higher rate if it were allowed.

Although it appears that the intent of rewriting of ch. 443, F.S., through enactment of ch. 2003-36, L.O.F., was not to change the meaning of the law, the Office of the Auditor General finds that the new language diverts from the original language of the law to require a change in tax rate calculation methodology if the language is not amended to its former condition as it existed in 2002. The new language enacted by ch. 2003-36, L.O.F., provided the definition for “total excess payments” to mean the sum of the individual employer excess payments for those employers eligible for a variation from the standard rate. The 2002 language provided the definition for “total excess payments” to mean the sum of the individual employer excess payments for those employers that were eligible to be considered for assignment of a contribution rate different from the standard rate. The Agency recommends amending the definition back to the original language in 2002 in order to avoid a change in tax rate calculation methodology.

⁸ Employment Records

Effect of Bill

Criminal Penalty - Claims Fraud

This bill creates a third degree felony related to unemployment compensation fraud. A third degree felony is punishable by imprisonment for up to 5 years, and a fine of up to \$5,000. This felony is unranked in the Offense Severity Ranking Chart of the Criminal Punishment Code, and is thus a Level 1 offense. The felony is committed by a person who:

- Establishes a fictitious employing unit by submitting fraudulent records relating to the business, including tax and wage reports;
- Introduces fraudulent records into a computer system of the agency or its tax collection service provider;
- Uses without authorization, computer facilities of the agency or its tax collection provider;
- Intentionally or deliberately alters or destroys computerized information or files; or
- Steals financial instruments, data, or other assets.

The bill deletes the requirement that a signed document must include an individual's telephone number, present or former place of employment, gender, date of birth, height, weight, and race in order to establish a prima facie evidence in any prosecution.

The bill provides that prima facie evidence of a personal UC benefit account by or for the individual is established when an applicant's name, residence address, date of birth, social security number and present or former place of employment is provided through the Internet or telephonic claims applications.

The bill provides that prima facie evidence that benefits were claimed or received is established through a transaction history generated by the applicant's Personal Identification Number together with documentation that payment was made to the order of the person by state warrant or direct deposit via electronic means.

The bill makes available all agency records relating to unemployment fraud for examination by the FDLE, states attorneys, or the Office of the Statewide Prosecutor in the prosecution of offenses under s. 817.568, F.S., or in proceeding brought under ch. 443, F.S.

Racketeering

The bill adds the newly created SUTA dumping felony to the list of predicate offenses that can give rise to a RICO offense.

Unemployment Compensation Appeals

The bill provides that when an appeal to an agency's determination appears to have been filed beyond the time limit allowed by law, the Office of Appeals may issue an Order to Show Cause to the appellant, requiring the appellant to show why the appeal should not be dismissed as untimely. If the appellant does not provide written evidence within 15 days of the mailing date of the Order to Show Cause that the appeal was originally filed timely or that he or she had good cause for failing to appeal timely, the appeal will be dismissed.

Recovery and Recoupment

The bill extends the time period for recoupment or restitution of benefits paid to a person not entitled to them from 2 years to 3 years.

Exceptions to the Administrative Procedure Act, ch. 120, F.S.

The bill provides that in proceedings relating to the administration of the Unemployment Compensation Law, ch. 443, F.S., special deputies of the Agency for Workforce Innovation are exempt from the uniform rules of procedure in the same manner that the Unemployment Appeals Commission and the agency's appeals referee's are currently excluded.

Benefit Eligibility

The bill provides that individuals receiving benefits while attending approved training are not subject to being denied benefits because he or she has not registered for work, is not able or available for work, or has failed to participate in reemployment services.

Wages

The UC system determines the amount of benefits an individual is entitled to receive on a claim according to the wages earned in employment. Subsection (1) of s. 443.1217, F.S., prescribes what wages are subject to the chapter. However subsection (2) relates to wages on which employers do not have to pay tax. According to the Agency, a technical amendment to this subsection is needed to ensure there is no misunderstanding that the wages specified in subsection (2) are only exempt from the chapter with respect to determining an employer's tax contributions. The bill clarifies that exemptions under chapter 443, F.S., are applicable to purposes of determining an employer's amount of contribution.

Variation of Contribution Rates Based on Benefit Experience

In determining an adjustment factor for excess payments, the bill amends the term "total excess payments" by providing that the sum of the individual employer excess payments for those employers that were eligible to be considered for assignment of a contribution rate different from the standard rate, bringing the law back to the original 2002 language.

SUTA Dumping - Affect on Rates

The bill provides that when an employer transfers its trade or business or a portion of the business to another employer and at the time of the transfer there is common ownership, management, or control between the businesses then the unemployment experience of the transferred business must be transferred to the employer to whom the business was transferred. At the beginning of the next calendar quarter immediately following the transfer, or as of the beginning with the current quarter if the transfer occurred on the first date of the calendar quarter, the rate of contribution for both the employers will be recalculated.

The bill provides that when it is determined a substantial purpose of the transfer of trade or business was to obtain a reduced rate of contributions, then the experience of the employers involved must be combined into a single account and a single rate assigned to the account.

The bill provides that when a person who is not an employer liable for contributions under ch. 443, F.S., acquires the trade or business of an employer, the unemployment experience of the acquired business cannot be transferred to the person if it is determined that the person acquired the business primarily for the purpose of obtaining a lower rate of contributions than the initial rate. The business must be assigned the initial rate rather than the lower rate. In determining whether the person was primarily

attempting to acquire a lower rate of the contribution, the agency's tax collection service provider will consider, but not be limited to, the following factors: whether the person continued the business enterprise of the acquired business; the length of time the business enterprise of the acquired business was continued; or whether a substantial number of new employees were hired for the performance of duties unrelated to the business of the acquired business.

SUTA Dumping - Penalties

The bill provides that if a person knowingly violates or attempts to violate the provisions of ch. 443, F.S., related to determining the rate of contributions or if a person knowingly advises another person to violate the law, the person shall be subject to the following penalties:

- An employer who knowingly violates these provisions will be assigned the maximum rate allowed by law for the rate year during which the violation or attempted violation occurred and for the following three rate years. If the employer is already at the maximum rate for any year or if the amount of the rate increase in the rate would be less than two percent, then a penalty rate of two percent will be imposed for the year and the following three years.
- A person who knowingly violates these provisions, but is not an employer, will be subject to a civil monetary penalty of up to \$5,000. The penalty will be assessed in accordance with the procedures and provisions of s. 443.141, F.S., relating to the collection of contributions. The penalties recovered will be deposited in the Employment Security Administration Trust Fund as provided in s. 443.211, F.S.

The bill defines the term "knowingly" to mean having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.

The bill defines the term "violates or attempts to violate" to include, without limitation, intent to evade, misrepresentation or willful nondisclosure.

This bill creates a third degree felony related to SUTA dumping. A third degree felony is punishable by imprisonment for up to 5 years, and a fine of up to \$5,000. This felony is unranked in the Offense Severity Ranking Chart of the Criminal Punishment Code, and is thus a Level 1 offense. The felony is committed by a person who violates any of the provisions related to SUTA dumping.

The bill requires the Agency for Workforce Innovation and the tax collection service provider establish procedures to identify transfers or business acquisitions covered under the paragraph and adopt rules necessary to administer the paragraph.

The bill provides that the meaning of "person" is has the same meaning given the term by section 7701(a)(1) of the Internal Revenue code of 1986.⁹

The bill provides that "trade or business" includes the employer's work force. The bill requires that the provisions relating to assignment of rates and transfers of experience be interpreted and applied in a manner that meets the minimum requirements of any guidance or regulation issued by the U. S. Department of Labor.

C. SECTION DIRECTORY:

Section 1: Amends s. 120.80, F.S., relating to exceptions and special requirements for administrative hearings conducted by various agencies.

⁹ "Person" is construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

Section 2: Amends s. 443.071, F.S., relating to criminal penalties for abusing the unemployment compensation program; deleting a requirement relating to signed documents; providing that prima facie evidence that benefits were claimed or received is established through a transaction history; providing stipulations for availability of all agency records.

Section 3: Amends s. 443.091, F.S., relating to benefit eligibility conditions to provide that individuals receiving benefits while attending approved training are not subject to being denied benefits because they have not registered for work, are not able or available for work, or have failed to participate in reemployment services.

Section 4: Amends s. 443.1216, F.S., relating to determining the type of employment that is subject to coverage; to eliminate the term "employment" in describing work activities that are not insured for unemployment compensation purposes; and to clarify that employee leasing companies may lease workers to a client.

Section 5: Amends s. 443.1217, F.S., relating to wages to clarify that wages are exempt only for purposes of determining an employer's amount of contribution.

Section 6: Amends s. 443.131, F.S., relating to determining an employer's rate of unemployment compensation contribution; creating a new paragraph relating to the assignment of rates of contributions; providing stipulations for a transfer of trade or business; establishes penalty provisions; provides for AWI to adopt rules to administer the provisions; provides definitions.

Section 7: Amends s. 443.151, F.S., relating to unemployment compensation appeals and claims recovery and recoupment.

Section 8: Amends s. 895.02, F.S., relating to the meaning of "racketeering activity."

Section 9: Provides an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

If enacted during the 2005 Legislative Session, Section 6 relating to SUTA Dumping will prevent the state from jeopardizing its annual federal grant for the administration of the UC program, which by federal law must be enacted by January 2006. The amount of the federal administrative grant totals approximately \$64 million annually.

2. Expenditures:

Nonrecurring Impact: According to the Agency for Workforce Innovation, the bill will have a non-recurring impact on the agency, resulting from enactment of the SUTA Dumping provision in Section 6 of the bill through mainframe computer programming changes. Programming changes that are determined necessary by the tax collection service provider or the Department of Revenue will be paid through the agency's annual federal grant and no additional appropriation will be required.

The Criminal Justice Estimating Conference has not determined the prison bed impact of the criminal provisions in this bill.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill is not expected to have an impact on local governments.

2. Expenditures:

The bill is not expected to have an impact of local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Persons who would previously take advantage of the law by engaging in SUTA dumping will no longer be able to do so, and will pay correspondingly higher UC rates. An employer violating or attempting to violate the SUTA dumping provisions of the bill will be subject to the maximum tax rate or a rate 2 percent higher. All other employers are expected to see slightly lower UC tax rates.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require a municipality or county to expend funds or to take any action requiring the expenditure of funds. The bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate. The bill does not reduce the percentage of state tax shared with municipalities or counties.

2. Other:

This bill provides for both civil penalties and criminal penalties for the same offense related to SUTA dumping. At one time, there was a question whether this might create a double jeopardy problem. Under current constitutional law, this is not considered double jeopardy. *Hudson v. United States*, 522 U.S. 93 (1997).

The criminal provisions related to SUTA dumping appear to perhaps, in part, refer to administrative rules to define the offense. A criminal offense cannot be defined by reference to administrative code. *B.H. v. State*, 645 So.2d 987 (Fla. 1994).

B. RULE-MAKING AUTHORITY:

The bill provides the Agency and the tax collection service provider with the authority to adopt rules necessary to administer the "SUTA Dumping Prevention Act of 2004."

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.