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.)

Prepared By: Banking and Insurance Committee

BILL:	CS/SB 1166
INTRODUCER:	Commerce and Consumer Services Committee and Senator Bennett
SUBJECT:	Labor Pools
DATE:	March 2, 2006
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gordon	Cooper	CM	**Fav/CS**
2.	Johnson	Deffenbaugh	BI	**Favorable**
3.				
4.				
5.				
6.				

I. Summary:

This Committee Substitute provides the following changes to the Labor Pool Act in ch. 448, F.S.:

- Limits the amount a labor pool may charge its workers for transportation to a maximum of $1.50 each way;
- Authorizes labor pools to pay their workers in cash from a cash-dispensing machine, under certain conditions, and for a transaction fee not to exceed $1.99;
- Specifies that an employee assigned by a labor pool or temporary employment agency (temporary help arrangement organization) to a client that is licensed, registered or certified pursuant to law is an employee of the client for purposes of licensure, registration or certification; and
- Specifies that an employee assigned to a client by a labor pool or temporary employment agency shall be deemed an employee of the labor pool or temporary employment agency for purposes of workers' compensation insurance and unemployment compensation tax.

This committee substitute amends the following sections of the Florida Statutes: 448.23 and 448.24, and creates section 448.26 of the Florida Statutes.

II. Present Situation:

The Labor Pool Act

Part II of ch. 448, F.S., also known as the Labor Pool Act[1] (the act), was enacted in 1995 to protect the health, safety and well-being of day laborers throughout Florida. The act also outlines uniform standards of conduct and practice for labor pools. Section 448.22(1), F.S., defines a labor pool as a business entity that operates a labor hall by one or more of the following methods:

- Contracting with third-party users to supply day laborers to them on a temporary basis;
- Hiring, employing, recruiting, or contracting with workers to fulfill these temporary labor contracts for day labor; or
- Fulfilling any contracts for day labor in accordance with this subsection, even if the entity also conducts other business.

Section 448.23, F.S., excludes temporary help services "which are engaged in supplying solely white collar employees, secretarial employees, clerical employees, or skilled laborers" and employee leasing companies as defined in s. 468.520, F.S.[2] Section 448.24, F.S., addresses the duties of labor pools and the rights of day laborers.

Paragraph (1)(b) of s. 448.24, F.S., provides that a labor pool may charge workers a "reasonable amount" for transportation to and from a worksite. This statutory provision further limits the amount that may be charged to "the prevailing rate for public transportation in the geographic area."[3]

Paragraph (1)(c) of s. 448.24, F.S., prohibits labor pools from charging a day laborer for cashing a worker's check. Paragraph (2)(a) of s. 448.24, F.S., addresses compensation of day laborers employed by labor pools and allows the following two methods of payment.

> Compensate day laborers for work performed in the form of cash, or commonly accepted negotiable instruments[4] that are payable in cash, on demand at a financial institution, and without discount.[5]

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[1] Sections 448.20-448.25, F.S.; ch. 95-332, L.O.F.

[2] Unlike labor pools and employee leasing companies, temporary help services are not specifically regulated by state statute.

[3] Recently, a Broward County circuit court found s. 448.24, F.S., violative of the Due Process Clauses of the Federal and Florida Constitutions. See, *Liner v. Workers Temporary Staffing, Inc.*, No. CACE 04-90205(04), (Fla. 17th Cir. Nov. 18, 2005). In that case, a day laborer sued the labor pool for which he worked claiming his employer overcharged him for transportation. Although Judge Robert Carney did not find the labor pool liable for these charges, he declared ss. 448.24 and 448.25, F.S., unconstitutional for failing to provide persons of "common intelligence and understanding adequate warning or fair notice of the proscribed conduct." Id. at p. 6. More specifically, the judge found the statute did not adequately define the terms "public transportation," "prevailing rate" or "geographic area" making it difficult to determine how to properly comply with its provisions. The judge also noted that an amendment to the House version of last year's proposed labor pools legislation, HB 525 (SB 1288), which would have set the round-trip rate for transportation at $3.00, passed that chamber. Importantly, he concluded: "If this measure passes the Senate and is written into law, it would, of course, resolve the [constitutional] issues presented above."

[4] Section 673.1041, F.S., defines a negotiable instrument, in pertinent part, as "an unconditional promise or order to pay a fixed amount of money."

[5] Section 448.24(2)(a), F.S.

Since passage of the act, cash-dispensing machines (CDM's) have become available as a method of paying day laborers. A CDM is similar to an automated teller machine and dispenses money in paper currency, but not in coins. Labor pools may either own or lease CDM's. The cash stored in the CDM is typically provided by a financial institution under a contract with the labor pool. According to a representative of one labor pool in the state, workers who use the CDM's have the option of receiving a paycheck or a pay voucher for the full amount of wages due. A worker who chooses to use a CDM is given a voucher containing a 10-digit access code that must be entered into the CDM. Once the worker completes the transaction, the CDM dispenses cash, minus the processing fee.[6] While his organization uses cash dispensing machines in other states, it does not now use them in Florida.[7]

Regulation of Check Cashing

Chapter 560, F.S., regulates money transmitters and defines them as: "Any person located in or doing business in this state who acts as a payment instrument seller, foreign currency exchanger, check casher, funds transmitter or deferred presentment provider."[8] The Office of Financial Regulation is responsible for regulating these entities. Generally, check cashers and financial institutions are required to be registered under ch. 560, F.S., however, it is unclear whether labor pools using cash dispensing machines must be registered as well.[9]

Part III of ch. 560, F.S., governs check cashing and foreign currency exchange. Section 560.309(4), F.S., sets fees that may be charged by check cashing establishments registered under that part:

> (4) Exclusive of the direct costs of verification which shall be established by commission rule, no check casher shall:
> (a) Charge fees, except as otherwise provided by this part, in excess of 5 percent of the face amount of the payment instrument, or 6 percent without the provision of identification, or $5, whichever is greater; . . .
> (c) Charge fees for personal checks or money orders in excess of 10 percent of the face amount of those payment instruments, or $5, whichever is greater.

Employee Leasing Companies

Section 468.520(5), F.S., defines an employee leasing company as "a sole proprietorship, partnership, corporation, or other form of business entity engaged in employee leasing." Subsection (4) defines employee leasing as "…an arrangement whereby a leasing company assigns its employees to a client and allocates the direction of and control over the leased employees between the leasing company and the client."

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[6] See, White Paper on file with the Committee on Commerce and Consumer Services provided by Larry Williams, representative for Labor Ready, Inc.

[7] Section 448.24(1)(c), F.S., prohibits labor pools from charging a day laborer for "directly or indirectly cashing a worker's check." To the extent a court determines that a voucher used in a cash dispensing machine constitutes a check, this practice could be construed to violate this statutory restriction. Florida currently has no case law addressing this issue.

[8] Section 560.103(11), F.S.

[9] As of the writing of this analysis, the Office of Financial Regulation had not determined whether the use of CDM's constituted "check cashing." No case law currently exists in Florida that addresses this issue; but at least one other state court has addressed it. A Rhode Island court found a labor pool had violated the state's requirement that check cashing businesses be registered with the Department of Business Regulation. The labor pool used CDM's as a payment tool, but failed to register as a check cashing business. See, *Labor Ready Northeast, Inc. v. McConaghy*, 849 A.2d 340 (R.I. 2004).

The term, employee leasing company, excludes a number of arrangements, including temporary help arrangements.[10] Subsection (6) defines a client company as "a person or entity which contracts with an employee leasing company and is provided employees pursuant to that contract."

Workers' Compensation

Chapter 440, F.S., contains the state's workers' compensation laws. Section 440.09, F.S., requires employers to pay compensation to employees who are injured on the job. The definition of "employer" includes employment agencies, employee leasing companies and similar agents who provide employees to other persons.[11] Labor pools and temporary employment agencies "provide employees to other persons," and, are deemed employers of those persons. Florida courts have held that labor pools are employers for the purposes of workers' compensation. For example, in *Rumsey v. Eastern Distribution, Inc.*,[12] the appellate court upheld a lower court's workers' compensation ruling against a worker who was injured while working at a distribution company to which he was assigned by a labor pool. The court classified the worker as a "borrowed servant" of the distribution company and found that the worker remained an employee of the *labor pool* for purposes of workers' compensation.[13]

Unemployment Compensation

Chapter 443, F.S., outlines the state's unemployment compensation program. Section 443.036(19), F.S., generally defines an employer as "an employing unit subject to this chapter under s. 443.1215, F.S." Although s. 443.1215, F.S., does not explicitly include a labor pool or temporary help services as an "employing unit," it appears to fit that provision's definition of an employer by providing that an employing unit is subject to this chapter if it paid wages of at least $1,500 for service in employment during the current or preceding calendar year. Therefore, it appears that labor pools that pay more than $1,500 in wages in a calendar year would be classified as employers under this definition and fall within the purview of ch. 443, F.S. [14] However, statutory exemptions may apply.[15]

In order to resolve disputes involving whether a worker is an employee for purposes of unemployment compensation, courts typically examine the nature of the "employment"

[10] The term "temporary" is defined in ch. 61G7-6.001(8), F.A.C., as a situation in which leased employees are needed for a period "not to exceed one year." Unlike employee leasing companies and labor pools, temporary help arrangement organizations (or temporary help services) are not specifically regulated by state statute.
[11] Section 440.02(16)(a), F.S.
[12] 445 So.2d 1085 (Fla. 1st DCA 1984).
[13] *Rumsey, supra*, at 1086. Notably, the plaintiff had already recovered workers' compensation payments from the labor pool when he sued the distribution company.
[14] At least one representative of a major labor pool entity indicates that his labor pool customarily pays unemployment compensation to its workers.
[15] Section 443.101(10), F.S.

relationship.[16] Generally, Florida Courts analyze "the employer's right of control over the mode of doing the work."[17]

III. Effect of Proposed Changes:

Section 1 amends s. 448.24, F.S., to set the amount a labor pool may charge for transportation at $1.50 each way and to permit the use of cash-dispensing machines (CDM's) by labor pools. Current law provides that the labor pool may charge the prevailing rate for public transportation in the geographic area. This committee substitute would allow the labor pool to charge up to $1.50 each way whether that amount is greater or less than the prevailing rate.

This section of the committee substitute also amends s. 448.24, F.S., to authorize a labor pool to pay workers using a CDM on the premises of the labor pool, if the following conditions are met:

- The labor pool offers payment by check, in compliance with s. 448.24(2)(a), F.S.;
- The laborer chooses to accept payment in cash through the CDM after disclosure of the transaction fee; and
- The CDM requires affirmative action by the day laborer to either accept the fee or negate the transaction in lieu of payment.

The committee substitute provides that the transaction fee for using the CDM may not exceed $1.99. Any coinage under $1 that is due to the day laborer is retained in the transaction fee since the machine can only dispense paper currency.

In addition, in order to obtain and use CDM's for this purpose, the labor pool or its affiliate may be required to be registered under ch. 560, F.S., the money transmitter statute.

Section 2 amends s. 448.23, F.S., to add a reference to s. 448.26, F.S., which is created in section 3 of this committee substitute.

Currently, s. 448.23, F.S., lists entities *not* covered by the Labor Pool Act. The introductory language of that statute specifically states: "*Except* as specified in s. 448.22(1)(c),[18] this part

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[16] Although labor pools are not explicitly defined as employers, a portion of s. 443.1216, F.S., which defines "employment," alludes to arrangements similar to labor pools. It states, in pertinent part: "[W]henever a client…which would otherwise be designated as an employing unit has contracted with an employee leasing company to supply it with workers, those workers are considered employees of the employee leasing company."

[17] *Dart Industries, Inc. v. Dept. of Labor and Employment Security*, 596 So.2d 725 (Fla. 5th DCA 1992). In *Freedom Labor Contractors of Florida, Inc. v. Division of Unemployment Compensation* the appellate court reversed the awarding of unemployment compensation to an employee who had been hired out by a temporary employment agency. The court reasoned that the employee was an independent contractor deserving of no compensation. Like labor pools, plaintiff Freedom Labor contracted with workers to provide its customers with temporary labor. The court noted that employees of the agency had control over the types of work they accepted; were not bound to a schedule; could take outside employment; received no benefits from the agency; had no taxes deducted from their pay; carried their own liability insurance and were required to sign independent contractor's statements. After listing these factors, the court concluded the agency "had no direct control over the details or the mode of work," and, therefore, was not liable to pay unemployment compensation to those employees. See, 779 So.2d 663, 666 (Fla. 3d DCA 2001)

[18] Paragraph (1)(c) of s. 448.22, F.S., defines a labor pool as a business entity that operates a labor hall by "fulfilling any contracts for day labor in accordance with this subsection, even if the entity also conducts other business."

does not apply to…."[19] then follows with a list of those entities *not* covered by the act. Those entities include: certain business entities registered as farm labor contractors; employee leasing companies, temporary help services engaged in specific areas of employment, labor union hiring halls or certain labor bureaus or employment offices.

This committee substitute adds a reference to s. 448.26, F.S., a new statutory provision created by section 3 of this committee substitute, to the introductory language of s. 448.23, F.S. This change will ensure that entities described in s. 448.26, F.S., like those listed in s. 448.22(1)(c), F.S., remain covered under the act.

Section 3 creates s. 448.26, F.S., to specify that an employee assigned by a labor pool or temporary employment agency (temporary help arrangement organization) to a client that is licensed, registered or certified pursuant to law is an employee of the client for purposes of licensure, registration or certification.

In addition, this section specifies that an employee assigned to a client by a labor pool or temporary employment agency (temporary help arrangement organization) shall be deemed an employee of the labor pool or temporary employment agency for purposes of workers' compensation and unemployment compensation.[20] This language comports with the workers' compensation requirements under ch. 440, F.S.

Section 4 provides an effective date of July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

[19] Reference and emphasis added.

[20] In regard to employee leasing companies, s. 468.534, F.S., provides that "any employee leased to a client company, who is licensed, registered or certified pursuant to law, shall be deemed to be an employee of the client company for such licensure purposes, but shall remain an employee of the employee leasing company as specified in chapters. 440 [workers' compensation] and 443 [unemployment compensation]."

B. Private Sector Impact:

Day laborers who choose to use a cash dispensing machine for payment of their wages will be subject to a transaction fee not to exceed $1.99. Research indicates this fee is less than the "check cashing fees" charged by check-cashing services and financial institutions.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.