

**The Florida Senate**  
**PROFESSIONAL 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: SB 1204

INTRODUCER: Senator Bennett

SUBJECT: Workers' Compensation

DATE: March 22, 2007      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Deffenbaugh	BI	<b>Pre-meeting</b>
2.			GA	
3.				
4.				
5.				
6.				

**I. Summary:**

Currently, under Florida law, workers' compensation insurance only covers an employee's injury if the employee suffers an injury arising out of work performed in the course and scope of employment.<sup>1</sup> If an employee deviates from his or her employment and is injured, the injury is generally not compensable unless the employee is responding to an emergency or the deviation is expressly authorized by the employer. Senate Bill 1204 limits compensability for employees who are injured while deviating from employment and defines what acts constitute a deviation. Specifically, the bill:

- Limits eligibility for benefits, relating to an injury occurring during a deviation from work, to deviations made in response to an emergency and designed to save life or property, which is compensable under current law. The bill further provides that an injury sustained during a deviation of a short duration is not compensable and eliminates compensability relating to a deviation expressly authorized by the employer. In contrast, the courts have held that injuries occurring as a result of an employee attending to personal comfort needs, such as restroom breaks, snack breaks, etc., are compensable.
- Specifies that a deviation from employment has occurred when the employee acts in a manner not directly related to the employer's work duties or acts in furtherance of the employee's personal interest. This may abrogate case law that has found that momentary "horseplay" is not a deviation.
- Clarifies that a deviation that represents an inherently dangerous act on the part of the employee is not compensable.

<sup>1</sup> Section 440.09, F.S.

This bill substantially amends the following sections of the Florida Statutes: 440.092.

## II. Present Situation:

In the workplace, injuries are compensable under workers' compensation insurance if they "arise out of and in the course of employment." If an employee deviates from his employment and is injured the injury is generally not compensable unless the employee is responding to an emergency or the deviation is expressly authorized by the employer. Section 440.092(3), F.S. relating to deviations, provides:

An employee who is injured while deviating from the course of employment, including leaving the employer's premises, is not eligible for benefits unless such deviation is *expressly* approved by the employer, or unless such deviation or act is in response to an emergency and designed to save life or property. [emphasis added]

The *Florida Workers' Compensation Handbook* notes:

If an employee suffers an injury while doing something outside the job duties, the employee has deviated from the job. Recognizing that employees do not always give full attention to the duties, the courts make a distinction between small and large deviations.<sup>2</sup>

With regard to the application of the current deviation statute, the *Florida Workers' Compensation Handbook* further states:<sup>3</sup>

...the court held that employees do not need *express* approval to attend to their personal needs, even if the need is to leave the premises to purchase cigarettes.<sup>4</sup> Thus s. 440.092(3), F.S., applies only while the employee is off premises on a temporary personal mission (other than for personal comfort), and there is no showing of any element of benefit to the employer... Thus, the court does not view attending to personal comfort, on or off the premises, as a deviation in the first place [*Bayfront Medical Center v. Harding*, 653 So. 2d 1140, 1141-1142 (Fla. 1<sup>st</sup> DCA 1995)].

Deviation cases can generally be divided into several types, including: horseplay, personal comfort, personal errands, and positional risk. In regard to horseplay, if an employee is injured during a momentary deviation from employment for the purpose of play, the injury might be compensable. The *Florida Workers' Compensation Handbook* provides:

When horseplay occurs during a lull in the work, the cases have held that the law does not consider the deviation to involve abandonment of any work duties. To render an injury not compensable, a deviation must amount to a wholesale abandonment of the employee's work.<sup>5</sup>

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<sup>2</sup> John J. Dubreil, *The Florida Workers' Compensation Handbook*, 7-41 (2005 Edition).

<sup>3</sup> *See id.* at 7-42.

<sup>4</sup> Ch. 90-201, L.O.F., amended s. 440.092(3), F.S., to require an employer to *expressly* approve the deviation in order for an injury relating to a deviation from work to be compensable.

<sup>5</sup> *See id.*

Horseplay involving wrestling between paramedics at a shift change was held by the court to be a momentary deviation that did not constitute wholesale abandonment necessary to deny a claim based upon the defense of horseplay.<sup>6</sup> However, when an injury sustained by an employee who was shot, as he opened his car door to obtain a cigarette, when a loaded firearm fell to the ground and discharged was not compensable under the personal doctrine or the horseplay doctrine.<sup>7</sup>

As noted above, case law has held that employees attending to “personal comforts,” (such as drinking a beverage, taking a smoke, snack, or lunch break, or using the bathroom) and incurring an injury during these acts may be compensable workers’ compensation injuries, unless there is a substantial deviation. An employee tripped and fell on a sidewalk about a quarter of a mile from her office during a 15-minute work break, injuring her hip, wrist, and hand. This sidewalk circled the place of employment and was not on the employment premises. The employee was subject to her employer’s control in that she could at any time have been required to work rather than be allowed the break. Also, her walk was not a substantial personal deviation, but occurred close to her employer’s premises and was tacitly condoned by the employer. The court held that the accident occurred within the course of employment.<sup>8</sup>

Generally, an employee who is engaged on a purely personal errand is not in the course of employment. A personal errand must be a substantial deviation to take an employee out of the scope of employment.<sup>9</sup> An employee working overtime, at his employer’s request, left his job to check on his car that he thought was being ticketed by the police, and was struck by a passing car. The court found the injury compensable because the deviation was insubstantial and held that the employee’s departure was for the benefit of the employer because the employee would complete additional work as a result of the overtime.<sup>10</sup>

Lastly, s. 440.092(3), F.S., provides that an employee is eligible for benefits if a deviation is in response to save life or property.

### III. Effect of Proposed Changes:

**Section 1** amends s. 440.092(3), F.S., relating to deviations from employment, to substantially revise compensability standards for injuries that occur during a deviation from employment. The bill provides that an employee who is injured while deviating from the course of employment, whether leaving or remaining on the employer’s premises, is not eligible for workers’ compensation benefits unless the deviation is in response to an emergency and designed to save life or property. The bill eliminates the current law compensability provided if the employer expressly approves the deviation.

The bill provides that an employee deviates from the course of employment when the employee acts in a matter not directly related to the employee’s work duties; or acts in furtherance of the employee’s personal interests. It is unclear whether accidents sustained while taking a coffee break or going to or returning from the restroom (“personal comfort doctrine”).

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<sup>6</sup> *Dunlevy v. Seminole County Department of Public Safety*, 792 So.2d 592 (Fla. 1<sup>st</sup> DCA 2004).

<sup>7</sup> *Galaida v. Autozone, Inc.*, 882 So.2d 1111 (Fla 1<sup>st</sup> DCA 2004).

<sup>8</sup> *Lanham v. Department of Environmental Protection*, 868 So.2d 721 (Fla 1<sup>st</sup> DCA 2004).

<sup>9</sup> John J. Dubreil, *Florida Workers’ Compensation Handbook*, 7-47.

<sup>10</sup> *Pixley v. Packer Pontiac Company*, 131 So. 2d 721 (Fla 1961).

The bill further provides that an injury sustained during a deviation from the course of employment is not compensable even where such deviation is of short duration and includes deviations where such deviation represents an inherently dangerous act on the part of the employee.

The bill provides that an injury sustained during a deviation from the course of employment would not be compensable even if the deviation is of short duration. It is unclear how the term, "short term," would be interpreted. It is unclear whether injuries incurred at work during brief breaks to attend to personal needs (such as trips to the bathroom or down the hall to get a cup of coffee) or momentary "horseplay" would be compensable. For example, if an employee trips and falls and injures himself or herself while going to a vending machine, the injury may not be compensable under the proposed bill because the act is not directly related to the employee's work duties.

**Section 2** provides that this will take effect on July 1, 2007.

#### **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.

B. Private Sector Impact:

The NCCI estimates the bill may decrease overall workers' compensation system costs in Florida. The magnitude of any potential savings is unclear, though, given the large amount of uncertainty in the number of cases affected and how the language will be interpreted. The resulting cost impact associated with this bill would be reflected through future workers' compensation experience. If the bill is enacted, increased litigation is expected as claimants who are denied benefits may seek legal interpretation of the new language.

In addition the bill may provide the injured worker with alternative legal remedies outside of workers' compensation, such as tort litigation, either as a result of being denied benefits or through a direct action. As a result, there may be some upward pressure on employers' liability claims which are covered under the employers liability portion of the workers compensation/employers liability policy. Any impact related to claims not covered by the workers compensation/employers liability policy would not be reflected in the NCCI's estimated impact of the bill.

**C. Government Sector Impact:**

Indeterminate.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.



## **VIII. Summary of Amendments:**

None.

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This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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